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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1957

No. 714. 28

MAXINE K. HINKLE, Administratrix of the Estate of W. Max Hinkle, Deceased, and MAXINE K. HINKLE,
Petitioners,

VS.

NEW ENGLAND MUTUAL LIFE INSURANCE COMPANY OF BOSTON, MASSACHUSETTS,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

BRIEF OF RESPONDENT.

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NEW ENGLAND MUTUAL LIFE INSURANCE COMPANY OF BOSTON, MASSACHUSETTS,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

BRIEF OF RESPONDENT.

QUESTIONS PRESENTED FOR REVIEW.

The Court of Appeals held that when a conditional receipt is issued for the payment in advance of a first premium for a life insurance policy and the effectiveness of the insurance is conditioned in the receipt upon the good health of the applicant and evidence of his insurability for

the plan and rating applied for, the insurer is entitled under Iowa law to a directed verdict if the applicant did not and could not meet the insurability condition set out in the conditional receipt because of his aviation pursuits.

The questions presented for review are:

1. Whether the defendant was entitled to a directed verdict under Iowa law on the grounds that the applicant failed to furnish evidence of his insurability at the date of the conditional receipt and in fact could not furnish evidence of his insurability for the plan and rating applied for because of his aviation activities, and whether the defendant was estopped from asserting this defense.

2. Whether the defendant was entitled to a directed verdict on the ground that the application and the receipt when construed together did not constitute a complete application for life insurance because of the failure to furnish evidence of good health in the absence of a medical examination and because of failure to furnish evidence of insurability, and that therefore there was no meeting of the minds of the parties sufficient to make an effective contract.

3. Whether the defendant was entitled to a directed verdict on the ground that the insertion of the words "Immediate Coverage" by the agent in the conditional receipt under the amount of insurance applied for did not vary the printed terms of the receipt, and if construed to vary said terms and effect a contract of temporary insurance, whether said contract was binding on the defendant because of the lack of authority of the agent.

4. Whether the defendant was entitled to a directed verdict on the ground that a contract of insurance for an amount in excess of $10,000 was invalid under the Iowa

statute prohibiting the issuance of such a contract without a medical examination.

5. Whether the plaintiff's rights under the 5th and 7th Amendments to the federal constitution were violated by the direction of the court to enter judgment for the defendant.

6. Whether the federal court had jurisdiction of the case on the ground of diversity of citizenship.

7. Whether the writ of certiorari in this case was improvidently granted.

STATEMENT OF THE CASE.

The "Statement of the Case" in the brief of opposing counsel is a mere statement of some of the facts. We feel constrained to make a restatement.

(1) The nature of the action.

This is an action at law on an alleged contract for temporary life insurance based upon a conditional receipt given to W. Max Hinkle, the proposed insured, for the payment of a first premium in connection with an application for a life insurance policy. A photostatic copy of this receipt is in the Record (pp. 17, 29), and it is printed in the petitioners' brief on page 13. In the interest of brevity we will not repeat it here.

The proposed insured was killed in an aeroplane accident the day after the receipt was given and before he had taken the medical examination required.

(2) The claim upon which the action is based.

The original petition, as it is denominated under Iowa practice, was in four counts. In the first two counts, the

plaintiff sued as administratrix of the proposed insured's estate, in Counts III and IV she sued in her individual capacity as beneficiary named in the application for the policy. Counts I, II and III were withdrawn from the jury, so that the only Count left in the case at the time of its submission to the jury was Count IV.

In preparing the petition, opposing counsel chose to repeat the allegations of Counts I and II in Count IV by reference only, so that it is necessary to read Counts I and II to find the substantive allegations of Count IV.

Count I (R. 2) is based on the claim that the conditional receipt in itself was a contract of temporary insurance effective immediately and that by reason of the death of W. Max Hinkle on February 26, 1955, the plaintiff as his administratrix is entitled to $10,500.00.

Count II (R. 4) repeats Count I and further alleges that the medical examination of the proposed insured was excused by his death before the time set by him and the defendant for said medical examination or it was waived by the defendant.

Count IV (R. 6) adopts by reference these two claims made by the plaintiff in her representative capacity as administratrix of the proposed insured's estate and alleges that she is entitled to recover as "the named beneficiary of the insurance."

(3) The defenses made to the claim.

The defenses to Count IV were as follows:

(1) That the conditional receipt was not a contract of temporary insurance, but a mere receipt delivered in connection with an application for life insurance, which was never completed by the proposed insured because he

failed to take the medical examination required as a part thereof (R. 8 and 9).

(2) That said receipt was conditioned upon the receipt of satisfactory evidence at the home office of the defendant in Boston that the proposed insured was insurable for the amount, plan and rating applied for; that because of the failure of the proposed insured to take a medical examination, no such satisfactory evidence has ever been received by the defendant at its Home Office in Boston and the insurance applied for never went into effect (R. 9).

(3) That if the receipt is construed, because of the insertion in the receipt of the words "Immediate Coverage", to be an agreement on the part of the defendant's agent that the insurance applied for would take effect immediately upon delivery of the receipt, said agreement was not authorized by the defendant and was not binding upon it (R. 10).

(4) That the proposed insured was not insurable for the amount, plan and rating applied for on account of his aviation record, and could not furnish satisfactory evidence that he was so insurable, and therefore the insurance applied for never went into effect (R. 11-12).

(5) That the defendant was prohibited under the laws of Iowa from issuing a policy of life insurance in the amount of $10,500 without a medical examination and the proposed insured knew that a medical examination was required, and because of the failure to take said medical examination, no complete application was ever made pursuant to which a valid policy or contract for $10,500 of life insurance could be issued under the Iowa statute (R. 12).

(4) The facts disclosed by the evidence.

Rodney Bliss, Jr., has been the general agent of the defendant in Des Moines, Iowa, for eight years. His contract with the defendant was introduced in evidence as Exhibit B (R. 36) and Section 2 thereof provides as follows (R. 37):

> LIMITATION OF AUTHORITY
>
> The General Agent is expressly forbidden to make, alter or discharge any policies, contracts or agreements on behalf of, or in the name of the Company, or to waive any forfeitures, or, except as otherwise agreed to in writing by a duly authorized officer of the Company, to incur any obligations or liability for which the Company shall be responsible.

Bliss did not know W. Max Hinkle, the proposed insured, but heard that he had a mortgage on his home and was employed by G. W. Onthank Company of Des Moines. One of the policies issued by the defendant is a decreasing term policy as described in its pamphlet Exhibit C (R. 36, 38). It provides convertible decreasing term insurance for a period of 10, 15 or 20 years. The initial death benefit is $1050 per unit, and the minimum amount issued is ten units, $10,500 initial risk. On the 20 year plan, the death benefit for ten units would be $10,500 in the first year as shown by the table in Exhibit C (R. 39) and would decrease $500 per year. If premiums were payable quarterly the first quarterly premium at age 42, Hinkle's age, would be $21.70 (R. 39).

Bliss called on Hinkle at the office of the Onthank Company on February 25, 1955, after a telephone conversation in which he had explained briefly to Hinkle the coverage of the decreasing term policy and obtained Part I of application for ten units with an initial death benefit of $10,500.

Hinkle signed Part I of the application (Exhibit D, R. 19, 36) which was filled out to cover all the information Bliss had to obtain from Hinkle. Hinkle gave Bliss a check payable to the New England Mutual Life Insurance Company for $21.70, the first quarterly premium (Exhibit E, R. 36, 40). This check was never deposited in the bank. It was held by Bliss pending an investigation by a Des Moines law firm purporting to represent Mrs. Hinkle, then returned to her on May 19, 1955 (Exhibit G, R. 36, 41). It was subsequently returned to Bliss by her attorney of record in this action and was tendered to her by the answer in this case (R. 10).

When the premium was paid Bliss detached from the application the conditional receipt at the bottom of the application form (R. 34). This receipt was a printed form. It contained blanks for filling in the amount of the payment, the amount of the insurance applied for, the name of the proposed insured, the date and the signature of the agent. Said receipt was introduced in evidence as Exhibit 1 (R. 17). Bliss filled in the amount paid "Twenty one and 70/100", the amount applied for, "$10,500.00", the name of the proposed insured (W. Max Hinkle), the date and his own signature and wrote under the figures "$10,500.00" the words "Immediate Coverage". He testified that he explained to Hinkle that this was meant to give the amount of the initial death benefit. Without some such qualification the receipt would indicate that the insurance would always be in the face amount of $10,500 whereas under this policy the amount was reduced $500 every year. It was explained to Hinkle that as the mortgage on his home was gradually reduced by partial payments, the amount of insurance would also be gradually reduced (R. 35, 32-33).

Part I of the application was not completed at the time with the form and amount of insurance. Those items had

been orally agreed upon, and Bliss testified that he asked Hinkle all the questions to which answers appear on the application and wrote them down in Hinkle's presence before Hinkle signed the application. He said that Hinkle answered "no" to the aviation question 17-a "Does the proposed insured plan to make flights as a trainee, pilot or crew member or has he made such flights within 10 years?" (R. 33.) Mrs. Hansen, a clerk in the same office, said that she did not hear Bliss ask Hinkle this question but she was busy at her own work and paid no particular attention to the conversation until Bliss picked up the telephone to call Dr. Posner (R. 29-30). She and Robert Evans who was in and out of the office while Bliss was there testified that it was common knowledge at the office that Hinkle had been flying as a pilot for years (R. 52-53). Bliss testified that he knew nothing whatever about Hinkle's aviation activities (R. 34).

After the application had been signed and the receipt delivered Bliss asked Hinkle when he could take the medical examination and Hinkle said "today". Bliss then telephoned Dr. E. R. Posner, the medical examiner of the company at Des Moines, for an appointment (R. 34). There is some conflict in the evidence as to the exact time the conversation took place. Mrs. Hansen, the clerk referred to, testified it was after lunch. Bliss said it was between 11 and 11:30 A. M. Bliss testified that he made an appointment with Dr. Posner for Hinkle at 11:45 that morning, that just as he was hanging up the phone Hinkle told him he was too busy and the appointment was made for 11:30 the following Monday (R. 34). This was verified by Dr. Posner in his testimony (R. 31). Mrs. Hansen, who was in Hinkle's office, testified that she heard Bliss tell Hinkle that the doctor could not see him that day and that the appointment was then made for Monday morning (R. 29).

Hinkle was killed while flying his plane which crashed near Des Moines the following day, Saturday.

The plaintiff, Mrs. Hinkle, testified that when she got up that Saturday morning her husband had gone and she found the conditional receipt on the kitchen table. Hinkle had planned to fly to Omaha that morning (R. 29).

Under the underwriting rules and practices of the defendant, if a proposed insured was a pilot, he was asked to fill out an Aviation Questionnaire (R. 47) and the application Exhibit D, states at the bottom of its aviation section No. 17, after the questions with regard to aviation: "If answer to A, B or C is yes, complete Aviation Questionnaire" (R. 19). The aviation questionnaire in use by the defendant was introduced in evidence as Exhibit H (R. 36, 42). It states at the top that it must be submitted if the proposed insured plans to make flights as a trainee, pilot or crew member or has made such flights within ten years. It contains a detailed list of questions showing the flying record, license, ownership of aircraft, etc. It contains the following instruction at the bottom:

> "Notice to Agent: If insurance with aviation coverage cannot be issued at standard rates, is
>
> ( ) full coverage with extra premium, or
>
> ( ) standard rate with aviation exclusion desired?"

In case of a pilot, if the proposed insured desired a full coverage with extra premium, he would be required to pay $3.75 extra premium for each $1000 of insurance (R. 47). If he desired the standard rate with aviation exclusion, he was required to sign an amendment limiting aviation coverage. The form of amendment was introduced in evidence as Exhibit I (R. 36, 44). It provides in substance that if the

death of the insured results from travel or flight or descent from or with any kind of aircraft of which the insured is acting as a pilot, the liability of the Company under the policy shall be limited to the premiums paid, less dividends, or the reserve whichever is greater. There is a place at the bottom for the signature of the proposed insured, to be witnessed by the agent.

Hinkle's aviation record was stipulated and shows that he had had a pilot's license from the Civil Aeronautics Administration since November, 1946, that he owned four aeroplanes in partnership with others; that he piloted a plane from the municipal airport in Des Moines every Sunday when weather permitted, that when he applied for a pilot's license in December, 1954, he reported total flying time of 1450 hours as a pilot, 43 of which occurred during the last six months of 1954 (R. 49-50).

Under the underwriting rules and practices of the defendant, if this record had been disclosed in the aviation questionnaire, Hinkle would have been given his choice to pay an extra premium for full coverage or to have the amendment limiting coverage attached to his policy. He was not insurable on the plan and for the rating applied for. If he had taken the medical examination, a report would have been obtained from the Retail Credit Company, which would have covered his aviation record and the policy would not have been issued as applied for (R. 47).

The only evidence as to the good health of the proposed insured was that he passed an examination for a pilot's license on December, 1954 (R. 50). There was no evidence as to the qualifications for such a license, and no medical and no lay testimony as to the proposed insured's state of health on February 25, 1955.

Part I of the application, Exhibit D, was never forwarded to the home office of the defendant (R. 47).

After Hinkle's death Bliss told the plaintiff that the defendant would not pay her because there had been no physical examination (R. 29).

A subsequent investigation was made by a firm of lawyers in Des Moines on behalf of Mrs. Hinkle and Bliss sent them the application (R. 40). It was subsequently returned to Bliss and the check was returned to Mrs. Hinkle (R. 41). Another lawyer was later retained and this suit was commenced.

We do not want to abuse the patience of the Court by going through the petitioner's brief and pointing out each misstatement of the record. We do, however, want to call the Court's attention to two important misstatements. The petition for certiorari refers to what opposing counsel seems to consider an estoppel from asserting that the receipt did not constitute a temporary contract of insurance, and he says: "Plaintiff did plead estoppel here." Statements to the same general effect are repeated again and again in the brief of opposing counsel. There is no mention of estoppel in the petition in the state court. The plaintiff filed a reply in which estoppel is pleaded four times. The first is in Division III (R. 22), where the plaintiff claimed that the defendant was estopped from pleading the agent's lack of authority to bind the company by a contract of temporary insurance. This question was not considered by the Court of Appeals in view of its holding as to insurability as stated in its opinion. The second plea of estoppel is in Division IV (R. 23) where the plaintiff alleges that the defendant is estopped under Section 511.34 of the Iowa code from proving the application for the policy because no copy was given to the applicant. The Iowa statute relates only to actions on a policy when issued and as no policy was issued here the statute does not apply. The third plea in Division V (R. 24-27) is that the

defendant is estopped from pleading that the alleged contract of insurance was invalid under Sec. 508.28 of the Iowa Code prohibiting a life insurance company from issuing a policy in excess of $10,000 without a medical examination. The Court of Appeals held that the defense under this statute raised an unsettled question of Iowa law upon which it was deemed unnecessary and hence inadvisable to express an opinion. The fourth plea is in Division VI (R. 27) which is a repetition of the second plea referred to above. We can find no pleading asserting that the defendant was estopped from asserting the invalidity of the receipt as a contract of temporary insurance because the proposed insured was not insurable for the plan and rating applied for.

The other important misstatement is that the Vice-President of the defendant "testified that Hinkle was insurable for every plan they had and for any amount they had". The actual testimony is as follows:

> "If Mr. Hinkle's aviation record had been disclosed in the aviation questionnaire a policy would not have been issued without any extra rating or without the limited aviation coverage." (R. 47).
>
> "If a man owns an aeroplane and answers the questions regarding aviation in Exhibit D in the affirmative, he would be *eligible* for every plan of insurance we have with either an aviation exclusion rider or it would cost him a little more money." (R. 48) (Emphasis ours).

(5) The issues actually tried in the District Court and how they were decided.

At the close of the evidence the defendant made a motion for directed verdict on several grounds and it was overruled. The opinion of the Court of Appeals does not

refer by number to the grounds on which the defendant was entitled to have that motion sustained, but it is obvious from the record that they were contained in the second, third, eighth and ninth paragraphs of the motion which are as follows:

> "2. The said conditional receipt was conditioned upon the receipt of satisfactory evidence at the home office in Boston that the proposed insured was insurable for the amount, plan and rating applied for. It appears from the record that no such evidence was sent to the home office of the defendant at Boston or received by it there, and in fact, no such evidence could have been furnished by the proposed insured in view of his aviation record.
>
> "3. The conditional receipt contemplated and expressly provided in the third clause of the printed matter therein 'If the company determines that the proposed insured is not so insurable, said application shall be declined and the amount paid will be refunded upon return of this receipt.' This provision requires and contemplates a determination by the company as to the insurability of the proposed insured for the amount, plan and rating applied for, and, provided that, if the company determines that the proposed insured is not so insurable, the application will be declined; that this provision negatives the construction of the receipt as being in itself a contract for temporary insurance.
>
> "8. It appears from the evidence that the proposed insured was informed that a medical examination was necessary in connection with his application for life insurance. His failure to take said medical examination, as shown by the record, was not due to any act or neglect on the part of defendant, and there is no evidence that said medical examination was waived by the defendant.

"9. It appears from the evidence that because of the proposed insured's aviation record, he was not insurable for the plan and rating applied for under the defendant's underwriting rules and practices. Regardless of whether the answer to Question 17(a) in the application was written by the agent before or after the proposed insured signed the application, if he had answered 'yes' to said question, he was not insurable for the plan and rating applied for."

The remaining grounds of the motion, which were not discussed in the Court of Appeals "for the reason that what has heretofore been said compels a reversal", (R. 96) will be stated and discussed in Divisions II, III and IV of this brief, and are therefore not printed again here in the interest of brevity.

After the motion to direct a verdict was overruled, the district judge instructed the jury that there was only one issue in the case, namely, whether the proposed insured was in good health on the date of the receipt; that if he was in good health, the conditional receipt created a contract of temporary insurance which remained in force until the defendant acted upon the application, and although defendant had not acted on the application, the contract of temporary insurance was in force on the date following the application, when the proposed insured was killed (R. 63, 64). Counts I, II and III were withdrawn from the jury (R. 54).

On this issue the jury returned a verdict for the plaintiff Maxine K. Hinkle, in her individual capacity as beneficiary named in the application, for $10,500, the full amount of the insurance applied for and judgment was entered thereon (R. 70-71).

The defendant then made a motion to set aside the verdict and judgment in favor of the plaintiff and to enter

judgment in its favor notwithstanding the verdict and it embodied in this motion the identical grounds stated in the motion to direct a verdict (R. 71). This motion was overruled and the appeal followed.

(6) The decision of the Court of Appeals.

The Court of Appeals in its decision pointed out that the receipt contained two provisos, the first pertaining to good health and the second to insurability, and held that the trial court erred in taking the position that good health and insurability are practically synonymous. It held that Iowa law controlled and followed the decision in *Reynolds* v. *Northwestern Mutual*, 189 Iowa 76, 176 N.W. 207, to the effect that under a receipt conditioned on insurability, said insurability was by the contract made the test of the company's liability (R. 87). It found that the evidence conclusively showed that Hinkle on account of his aviation activities was not insurable for the plan and rating applied for (R. 96). It expressed the belief that the Iowa court would not find the receipt ambiguous (R. 91), (although no question of ambiguity had been raised by the pleadings). It therefore held "that the defendant was legally entitled to have its motion for directed verdict sustained upor the basis that the insurance was not in effect at the time of the applicant's death for the reason that the applicant did not, and could not, meet the insurability condition set out in the conditional receipt because of his aviation pursuits." (R. 96).

The court went on to say:

> "Other issues argued by the parties have been considered but do not warrant discussion for the reason that what has heretofore been said compels a reversal."

For that reason it made no mention of the first paragraph of the motion for directed verdict (R. 55) to the

effect that there was no complete application because there was no medical examination, and hence no meeting of minds. With respect to the second and third paragraphs of the motion relating to the insertion of the words "Immediate Coverage" under the amount of insurance applied for in the receipt (R. 55, 56), the Court of Appeals agreed with the district judge (R. 66) that the addition of these words added nothing to the receipt because if the conditions of the receipt had been complied with the insurance would have taken effect immediately, and with this construction of the receipt as a whole "we do not reach the serious question of the authority of the agent Bliss to alter the receipt or to agree to immediate unconditional coverage." (R. 90, 91). With respect to paragraphs 6 and 7 of the motion (R. 56, 57) which should be read together and which relate to the Iowa statute prohibiting insurance in excess of $10,000 without a medical examination, the court said that this raised "an unsettled question of Iowa law upon which we deem it unnecessary and hence inadvisable to express an opinion." (R. 91-92).

No constitutional questions and no jurisdictional questions were presented to the Court of Appeals on the original submission and hence there is no mention of them in the opinion except for the brief statement that: "Jurisdiction based upon diversity of citizenship is established" (R. 82).

SUMMARY OF THE ARGUMENT.

1. The purpose of a conditional receipt for the payment of a first premium in connection with an application for life insurance conditioned upon the insurability of the applicant is to protect him against subsequent change of health or unforeseen casualty before the policy is actually

delivered, *if he was in fact insurable at the date of the receipt.* It is not to give him temporary insurance if he is not insurable. Under the law of Iowa as announced by its Supreme Court in *Reynolds* v. *Northwestern Mutual,* 189 Iowa 76, 176 N.W. 207, the conditional receipt in the case at bar did not create a contract of temporary insurance because the applicant did not furnish evidence that he was insurable for the plan and rating applied for and for the further reason that he could not furnish such evidence. Iowa decisions relating to estoppel and the so-called "mending his hold" doctrine are not applicable as no estoppel was pleaded by the plaintiff to the defense that there was no contract because the applicant was not insurable and could not furnish proof of his insurability by reason of his aviation activities. The Court of Appeals, in an opinion written by a Judge who is a resident of Iowa and served for many years as a District Judge there, followed the law of Iowa and its determination of that law should be followed by this Court. The decision is not in conflict with the decisions in *Gaunt* v. *John Hancock Mutual,* (2nd Cir.) 160 F.2d 599, and *Liberty National Life* v. *Hamilton,* (6th Cir.) 237 F.2d 235, because of the differences between the provisions of the various receipts and because the last named cases were decided under the laws of Connecticut and Tennessee respectively and not under the law of Iowa. The defendant was entitled to a directed verdict on the grounds stated in Paragraphs 2, 3, 8 and 9 of its motion, and the Court of Appeals decision in favor of the defendant should be affirmed.

2. Even if the Court of Appeals erred in the reason for its decision as stated in the opinion, the defendant was entitled to a directed verdict under the ground stated in Paragraph 1 of its motion because the conditional receipt was only a part of a transaction consisting of an applica-

tion for life insurance and no complete application was ever made because the applicant never had a medical examination and did not furnish evidence of his insurability. There was therefore no acceptance of the offer contained in his application and no meeting of the minds sufficient to make a contract.

3. Even if the Court of Appeals erred in the reason for its decision as stated in the opinion, the defendant was entitled to a directed verdict on the ground stated in Paragraph 5 of its motion because the addition of the words "Immediate Coverage" by the agent under the amount of insurance applied for in the receipt did not alter the printed provisions of the receipt or waive the two provisos contained therein. If it should be construed to have this effect, no valid contract of insurance was effective because the agent had no authority to make contracts for the defendant.

4. Even if the Court of Appeals erred in the reason for its decision, the defendant was entitled to a directed verdict on the ground stated in Paragraph 6 of its motion because a contract of life insurance in excess of $10,000 is not permitted by Sec. 508.28 of the Code of Iowa, 1954, without a medical examination and any alleged contract in excess of that sum without such an examination is invalid.

5. The rights of the plaintiff under the 5th and 7th Amendments were not violated by the direction to enter judgment for the defendant.

6. The federal court had jurisdiction of this suit because of the amount involved and the diversity of citizenship between the plaintiff in her dual capacity, a citizen of Iowa, and the defendant, a corporation organized under the laws of Massachusetts and a citizen of that state.

7. In view of the issues as now developed by the briefs of counsel, it appears that the writ of certiorari should not have been granted as this is not a case of public importance but a mere attempt to use this court as a further court of appeal by a defeated party and there is no conflict between circuits.

ARGUMENT.

Division I.

Under the law of Iowa which governs the conditional receipt no temporary contract of insurance became effective because no evidence of insurability for the plan and rating applied for was ever furnished to the defendant, and for the further reason that the proposed insured could not furnish satisfactory evidence of such insurability on account of his aviation record.

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a. The nature and purpose of a conditional receipt for the payment of the first premium on a life insurance policy in advance.

The subject of temporary life, accident or health insurance is exhaustively treated in a note in 2 A.L.R. 2d 943. The note writer refers throughout to receipts given for the first premium as "binding receipts," but we submit that this is a misnomer and that they should be referred to as conditional receipts because they all, with the exception of one class hereinafter mentioned, are based upon conditions. The receipt in the case at bar is entitled in large print "CONDITIONAL RECEIPT." The

note writer divides receipts of this kind into four categories listed in the opinion of the Court of Appeals (R. 88-9). The second of these categories reads as follows:

> "(2) Another type of receipt provides that the insurance shall be effective as of the date of the medical examination, if the company shall be satisfied that on that date the applicant was an insurable risk and that the application was otherwise acceptable under the company's regulations for the amount and plan of the policy applied for. In some instances the date of the application is taken instead of the date of the medical examination."

The receipt in the case at bar falls within this category as noted by the Court of Appeals.

The note writer omits a fifth category: an absolute unconditional binding receipt. In an article by W. L. Wilkinson published in 1949 Proceedings of Legal Section of the American Life Convention, page 37, he refers to receipts which are unconditional binders. He writes that such receipts are used by only two companies, one in the United States and one in Canada, and he quotes these forms of receipt as showing what constitutes an unconditional receipt which can really be described as a binding receipt and which immediately creates a contract of temporary insurance. The one used by the American company says:

> "If said sum is sufficient to pay in full a first premium in accordance with the published rates of the company on the date hereof for the policy as applied for, the company will be liable from and after said payment to the same extent as if the policy, as applied for, had been issued and delivered at that time; provided, however, that (1) the company reserves the absolute right to reject said application and if said application be rejected (and without notice thereof) all liability on the part of the company shall thereupon and forth-

with cease and terminate automatically except as to claims maturing before such rejection; and (2) if said application be neither approved nor rejected by the company at its home office within forty-five (45) days from the date of said application it shall be deemed to have been rejected as of the last day of such forty-five (45) day period, without notice to that effect."

A mere glance at this receipt shows the vital difference between it and a conditional receipt. Under it, the temporary insurance becomes immediately effective without any condition. The receipt in the case at bar was headed in bold face type by the words "Conditional Receipt". The same sentence providing that the insurance applied for should be in full force from date contained two express provisos: First, that the proposed insured be in good health; and second, that satisfactory evidence of his insurability for the amount, plan and rating applied for be received at the home office of the company in Boston. It contemplates that the proposed insured may not be able to furnish satisfactory evidence of his insurability and provides that in that event the application will be declined and the advance premium refunded.

The District Judge himself did not treat the receipt as an unconditional binder. He recognized the validity of the first proviso relating to the good health of the proposed insured and told the jury that if that proviso was fulfilled, the insurance became immediately effective (R. 63). We confess that we cannot understand his reasoning. If he considered the receipt an unconditional binder, then both the provisos were ineffectual to prevent the temporary insurance from going into effect at once. But if the first proviso was a valid condition, under what process of reasoning or rule of grammar can the second proviso be completely ignored? It was just as valid and effective as the first one. There was no repugnancy or ambiguity in the

receipt. The proposed insured knew that he had to have a medical examination; he knew from the language of the receipt that the application might be declined, in which case the premium would be returned. He was bound to know that his application was not complete and would not be complete until he took the medical examination and he was bound to know that the insurance would not take effect from date unless both provisos in the receipt were complied with: namely good health and evidence of insurability.

It is important at this point to correct a misconception of the purpose and effect of a conditional receipt which appears in a few judicial opinions. It is suggested there that such a receipt is a trap for the unwary applicant who believes that he has temporary coverage when in fact the insurer intends not to cover him. Nothing could be further from the truth.

If the applicant pays the premium in advance and gets a receipt conditioned upon insurability, and if he is insurable, the insurance becomes effective from the date of the application. If his death occurs before the policy is issued or if his health changes, the insurance is nevertheless in force. The receipt in the case at bar does not require that the evidence of insurability be received at the home office during the lifetime of the applicant or while he is still in good health. Let us take two supposititious cases. Let us assume that Mr. Hinkle had taken and passed a satisfactory medical examination, and that he had had no aviation record, and that he was otherwise insurable. If he had been killed on the day after the application, the claim would have been paid even though the papers did not arrive in Boston until after his death. Let us then assume the same facts but instead of his death, let us assume an unsuspected heart attack, the day after the examination, but that he survived the attack although his health was severely impaired.

Then again the policy would have been issued and would have been in force in spite of his change in health and even though he was uninsurable because of that change of health when the policy was actually issued.

The point to be emphasized is that the purpose of such a conditional receipt is to protect the applicant who is insurable, during the necessary lapse of time between the date of his application and medical examination and the actual issuance of the policy. It is not to protect or give temporary coverage to an applicant who is not insurable for the plan and rating applied for. In that event the advance premium is refunded.

The following cases are of interest as bearing upon the nature and effect of a conditional receipt and the meaning it should have to the applicant: *Northwestern Mutual* v. *Neafus*, 145 Ky. 563, 140 S.W. 1026; *Maddox* v. *Life & Casualty Co.*, 79 Ga. App. 164, 53 S.E.2d 235 and *Mutual Benefit* v. *Edwards*, 174 Okla. 210, 50 P.2d 144. To quote from the Neafus case, where the receipt was conditioned upon the approval of the application: "There is nothing unfair or unreasonable or oppressive in the conditions of this receipt."

If the receipt in the case at bar is construed to create in itself a temporary contract of insurance, the defendant insured a risk without ever having the opportunity to accept or reject it. In fact so far as its home office was concerned it had no knowledge that a partial application had been made. We believe it violates every principle of life insurance law to hold that an agent can bind a life insurance company to an unlimited risk without a medical examination or without any opportunity whatever for the officers of the company to pass upon the insurability of the applicant. The only exception to this rule arises when

the company is willing to issue an unconditional *binding* receipt of the kind which we have mentioned above.

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b. Under the law of Iowa the test of the insurer's liability under a receipt conditioned upon insurability is the insurability of the applicant on the date of the application for the plan and rating applied for.

The validity of the alleged contract of temporary insurance will have to be determined by the law of Iowa and it so happens that one of the leading cases is an Iowa case, *Reynolds* v. *Northwestern Mutual*, 189 Iowa 76, 176 N.W. 207. It is the only case in the Iowa Supreme Court involving this kind of a receipt. In that case the applicant signed an application for a life insurance policy, paid the first premium, received a receipt therefor and took the medical examination all on the same day, December 5. The application provided in Section (2) thereof that if the premium was paid in advance, "the insurance (subject to the provisions of the said company's regular form of policy for the plan applied for) shall be effective from the date of the medical examination therefor and such a policy will be issued and delivered to me or my legal representatives provided the said company in its judgment shall be satisfied as to my insurability on the plan applied for on the date of such medical examination; and (3) that if said company shall not be so satisfied the amount of the premium paid shall be returned."

The receipt acknowledged receipt of the first quarterly premium on the policy applied for: "the said payment being made by him subject to the terms and conditions of agreements (2) and (3) contained in his said application."

While the language is not identical the legal effect of (2) above is the same as that of the second proviso in the receipt in the case at bar. It is a receipt conditioned upon insurability. The report of the medical examiner in the *Reynolds* case was satisfactory and the application and report arrived at the Company's home office on December 7th. On the morning of December 8th the applicant died suddenly, and after his death the application was rejected on the ground that he was not insurable. The court held that preliminary contracts of insurance were sustained by the courts and were it not for the proviso such a contract would have been effective. Because of the proviso and the fact disclosed after the applicant's death that he was not insurable, the court held that no temporary insurance ever became effective. The opinion quotes the clause in the application quoted above down to the word "provided" and then goes on to say:

> "Construed independent of what follows, the clause just quoted makes the insurance effective from the date of the medical examination therefor and sustains appellant's construction. The contract must however be construed as a whole and effect given to the following provision thereof.
>
> 'Provided the said company in its judgment shall be satisfied as to my insurability, on the plan applied for, on the date of such medical examination.'
>
> "Counsel for appellant arrives at his conclusion by treating this clause as a limitation upon the following language only, 'and such a policy shall be issued and delivered to me or my legal representatives:' that is, he contends that the insurance, becoming effective upon the date of the medical examination, continues in full force until the application is rejected by the company.
>
> "There can be no question under the form of contract in question, that, if the insurance applied for ever

becomes effective, it is as of the date of the medical examination. This is true if the application is accepted and a policy issued. That the contract contemplates that liability of the company will attach before the issuance of a policy is clearly indicated by the parenthetical clause of the contract which makes the insurance subject to the provisions of the company's regular form of policy applied for. The receipt, signed by the company's agent and delivered to the applicant, for $13.19, recites that this sum is the amount of the first quarterly premium on such policy. The quarter for which the premium was paid commenced on the date of the medical examination, because that was the date upon which the insurance would have commenced, if a policy had issued."

* * *

"We have no doubt that the proviso in the contract relates to all of Clause 2 that precedes it; but it is our conclusion that the contract became binding, and the insurance effective, on the date of the medical examination, subject, however, to the provisions of the company's regular form of policy for the plan applied for, and the insurability of the applicant on the date of such medical examination. *The insurability of the applicant on the date of the medical examination is, by the contract, made the test of the company's liability.*" (Emphasis ours).

This case, which is the law of Iowa, is absolutely decisive of the case at bar. It is stronger than the case at bar because there was an actual medical examination which was satisfactory. We have examined the original abstract of the record on appeal in the office of the Clerk of the Supreme Court of Iowa and the report of the medical examiner contains this question and his answer thereto:

Q. "Do you unqualifiedly recommend the acceptance of this risk for a life policy?"

"I do."

It was only after the applicant's death that the company asked for further information about his previous illness, and when it learned of his death, no further investigation was made. The proofs of death showed pre-existing disease and were introduced in evidence. In the case at bar there was no medical examination, consequently no complete application and no notice given to the defendant of the execution of the receipt and Part I of the application until after the applicant's death. Said Part I was never received in Boston. After an investigation by attorneys for the plaintiff, the defendant's agent returned the check given for the premium, which had never been cashed. The evidence shows not only that the proposed insured failed to furnish any evidence of his good health by passing the medical examination as required but it also shows that he could never have furnished truthful evidence of his insurability because of his aviation record.

The Reynolds case has been cited by many other courts and appears in all the literature relating to conditional receipts. It squarely holds that the temporary insurance is conditioned upon the provisos contained in the receipt and unless these provisos are complied with, no insurance ever becomes effective.

The gist of the petitioner's argument is that the Court of Appeals did not follow the law of Iowa as required by *Erie Railway* v. *Tompkins*, 304 U.S. 64. The gist of our argument is that the Court of Appeals did follow the law of Iowa as laid down in *Reynolds* v. *Northwestern Mutual*, 189 Iowa 76, 176 N.W. 207. As we pointed out above, the receipt in the Reynolds case was conditioned upon insurability and the essence of the decision is contained in this statement by the Court:

> "The insurability of the applicant on the date of the medical examination is by the contract made the test of the Company's liability."

In that case the insurance was to take effect on the date of the medical examination; in the case at bar it was to take effect on the date of the receipt. This makes no difference in the result obtained.

Counsel asserts that the Court of Appeals ignored Iowa decisions that the receipt "was a contract until a policy was rejected". The only Iowa case he could be referring to is the Reynolds case, and his contention is exactly the same contention which the plaintiff made in the Reynolds case as stated by the Iowa Court in its opinion in these words, referring to counsel for the plaintiff:

> "that is, he contends that the insurance, becoming effective upon the date of the medical examination, continues in full force until the application is rejected by the company."

If we can read the English language, it is clear to us that the Reynolds case squarely decided that this contention was unsound. One would think from the conclusions which counsel draws that this case was decided in favor of the plaintiff. On the contrary the Court held that the defendant was entitled to a directed verdict.

On page 4 of his brief, opposing counsel purports to state the law of Iowa as laid down in the Reynolds case. This is not a quotation from the case although at first glance it appears to be. There is absolutely nothing in the Reynolds case about a defeasance clause. The phrase "defeasance clause" is not used in the opinion. We are not relying on any defeasance clause in the receipt. We are relying on the second proviso in the receipt requiring evidence of insurability. The proviso has not been complied with, and under the rule in the Reynolds case no temporary insurance ever became effective. The other Iowa cases cited do not deal with conditional receipts and have

no application to the case at bar for reasons which will be pointed out later in this brief.

The important point about the case at bar is the fact that no proof of either good health or insurability was ever furnished the defendant. It takes some temerity to say that there is no case in the courts upholding a specific rule of law. In the recesses of the New York Supplement or the officially unreported opinions of intermediate appellate courts, cases can sometimes be unearthed which will dispute any categorical statement. However, we have made an extensive and careful search of the authorities including all those that we can find in which temporary contracts of insurance have been upheld. *We can find no case holding that a receipt conditioned upon insurability constitutes a temporary contract of insurance when in fact the applicant is not insurable for the plan and rating applied for.* The diligence of opposing counsel has only resulted in the citation of two decisions which he claims support his position: *Gaunt* v. *John Hancock*, 160 F.2d 599 and *Liberty National Life* v. *Hamilton*, 237 F.2d 235. The receipts in those cases are quite different from that involved in the case at bar but in both of them the applicant was found to be insurable. The cases are discussed and analyzed in subdivision f of this Division of our brief.

It is well to note here again that the two provisos in the receipt referred to two different things; first, good health; second, evidence of insurability. The latter term is broader than the first as held by the Court of Appeals, citing a number of cases which need not be repeated here. Counsel complains of this holding because it was based on the weight of authority without any Iowa cases. As pointed out below this holding was not the basis for the reversal. It was merely an explanation for the holding of the trial court that the second proviso in the

receipt added nothing to the first. The Court of Appeals held that the defendant had a right to consider factors other than good health, as for instance aviation activity, in determining insurability. It is clear that in the absence of an Iowa decision the court had a right to determine the general law on the subject as held by this court in *King* v. *United Commercial Travelers*, 333 U.S. 153, 92 L. Ed. 608, and many other cases. And as pointed out by Justice Stone in *Meredith* v. *Winter Haven*, 320 U.S. 228, 88 L. Ed. 9, if the highest court of the state has not answered a question of state law and the character of the answers which it might ultimately give remains uncertain, the federal courts will not hesitate to decide them in diversity cases.

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c. No contract of temporary insurance ever took effect for the reason that the second proviso in the conditional receipt relating to insurability never could have been complied with, because the proposed insured's aviation record made him uninsurable for the plan and rating applied for.

Under the conditional receipt the taking effect of the insurance was conditioned upon the furnishing of satisfactory evidence to the defendant's home office in Boston that the proposed insured was insurable for the amount, plan and rating applied for. Although he never completed the application by executing Part II and taking the medical examination, he did make certain representations in Part I. Question 17A is: "Does the Proposed Insured plan to make flights as a trainee, pilot or crew member or has he made such flights within 10 years." His answer was "No".

(R. 19). He was killed the next day in a crash while piloting his own plane (R. 50).

It is clear from the record that if true answers had been given as to his flying record the policy would not have been issued for the plan and rating applied for. The defendant would have offered him a policy with an aviation exclusion rider under which it would have only been liable for the first premium if the applicant had been killed during the first year while flying his own plane. This would not have been a policy on the plan applied for as the policy applied for contemplated no limitation of liability on account of aviation. In the alternative the defendant would have offered him full coverage by the payment of an extra premium of $3.75 per $1,000. This would not have been a policy for the rating applied for (R. 47).

However, the true facts in regard to the aviation record of the proposed insured were not given in the application. If he had passed a satisfactory medical examination these true facts would undoubtedly have been discovered by the Retail Credit Company and would have resulted in an aviation questionnaire and the procedure would have been followed as set forth in the preceding paragraph. And even if the true facts had not been discovered at the time and if the policy had been issued and delivered to the proposed insured during his lifetime it could have been rescinded by the defendant during the contestable period by reason of the misrepresentations as to the aviation record contained in the application.

The case of *Reynolds* v. *Northwestern Mutual*, 189 Iowa 76, 176 N.W. 207, which we have referred to at length in the preceding division of this argument is also a case on which we rely in support of the point stated at the head of this division. It is the law of Iowa and it is decisive of the

case at bar. It is supported by cases from other jurisdictions.

Warren v. *New York Life,* (5th Cir.) 128 F.2d 671, involved facts almost identical with those in the case at bar. The premium was paid in advance. The application and the receipt made the effective date of the policy the date of the application, if the company after medical examination and investigation was satisfied that the applicant was on that date insurable on the plan and at the company's published premium rate corresponding to his age, whether the policy was delivered or not. In his application he stated that he had never flown, although he had been a passenger within the past month. He repeated this misstatement in his answers to the medical examiner in Part II of the application and gave the further answer "No" to the question: "Do you contemplate participation in aeronautics?" Immediately after he took the examination he went to the municipal airport, signed for a training course in aviation to obtain a license as a private pilot and flew for thirty minutes. During the next 13 days he flew five more times. The application was sent to the home office and a policy was issued and sent to the local office for delivery, but before it was delivered the company was informed that the applicant was taking flying lessons. It promptly ordered that the policy be returned, and sent the agent a notice of suspension which included the sentence "Kindly have aviation blank completed." The agent notified the applicant and delivered the notice of suspension. He gave him an aviation questionnaire and a copy of the aviation clause limiting liability for death when operating any kind of aircraft except as a fare paying passenger. This questionnaire and aviation clause was similar to the questionnaire and aviation amendment identified as Exhibits H and I in the case at bar. The applicant never filled out the ques-

tionnaire and was killed in an automobile accident about ten days later. It will be noted that in this case the policy had actually been issued, so it is obvious that the medical examination was satisfactory. Suit was commenced on the application and in the alternative for damages, but the court held that there was no contract and there could be no recovery on the application. The court said:

> "Certain it is that the policy of insurance was not in force and effect. It had not been delivered. It had been recalled by the home office from the branch office in Shreveport and the applicant had been informed and had been given written notice that his application had been suspended pending completion of the aviation questionnaire and approval of the aviation endorsement. The applicant had no policy of insurance. His application then stood suspended, and he knew it had been suspended, and he also knew the reason for the suspension. Recovery may not be had on the application."

The procedure followed in the *Warren* case is just what would have happened in the case before us if the proposed insured had completed his medical examination on the date of the application and the papers had been fully forwarded to the defendant in Boston, assuming that death had not occurred the following day and that the medical examination was satisfactory. The report of the Retail Credit Company would have unquestionably disclosed the aviation record in view of the general knowledge of the proposed insured's long aviation activity as shown by the testimony of the witnesses, Mrs. Hansen and Robert Evans (R. 52-53), and the stipulation (R. 49). It would then have appeared that the proposed insured was not insurable for the plan and rating applied for. The defendant would have called for an aviation questionnaire, and given Hinkle an opportunity to choose between an additional premium or

the amendment limiting aviation coverage. If he chose the first alternative, the policy issued would not have been a policy for the rating applied for. If he chose the second it would not have been a policy on the plan applied for, as the policy applied for contemplated no limitation of liability for death while piloting an aeroplane.

See also *Gonsoulin* v. *Equitable Life Assurance Society*, 152 La. 865, 94 So. 424, *State ex rel. Equitable* v. *Robertson*, (Mo.) 191 S. W. 989, and *Raymond* v. *National Life*, 40 Wyo. 1, 273 Pac. 667, cited by the writer of the note in 2 A.L.R. on page 987 as supporting the same rule announced in the Reynolds case from Iowa and the Warren case referred to above.

Stone v. *Prudential*, 268 N. Y. 91, 196 N.E. 754, is in line with the cases cited above where there was a misrepresentation in the application as to the insurability of the applicant. The facts are not set out in the memorandum decision of the Appellate Division, 243 App. Div. 671, 277 N. Y. S. 921, but it appears from the facts stated by the Court of Appeals that suit was brought on two applications and a receipt. The applicant died before the policies were issued, but there was evidence that he had made misrepresentations as to previous illnesses and accident. The court held in a *Per Curiam* opinion:

> "Some of the answers in the applications for insurance being palpably false, and such answers being a part of the applications which would have been incorporated in due course in the policies, it follows that the judgments in favor of the plaintiff should be reversed and the complaint dismissed, with costs in all courts."

It is fundamental that a policy can be set aside for fraudulent misrepresentations made in the application as to previous diseases, medical treatment or other matters

affecting insurability. If a duly issued and delivered policy is subject to rescission on these grounds, it obviously follows that the effect of false representations on the validity of a conditional receipt would be the same even though no policy is issued. That is the conclusion of the note writer in 2 A.L.R. 2d 1013, where he says:

> "The effect of false representations on the validity of a binding receipt is the same as in the case of a policy. It will be vitiated thereby."

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d. No issue of estoppel to assert the defenses referred to in this division of the argument is in the case because no estoppel was pleaded, and the cases referring to the so-called "mending his hold" doctrine are not applicable here.

In his petition for the writ in this case opposing counsel asserted repeatedly that estoppel had been pleaded to each defense. He attempted to distinguish the Reynolds case by saying that estoppel had not been pleaded there and conceded that under the Iowa rule estoppel must be pleaded. We called the Court's attention in our resistance to the fact that estoppel was not pleaded in the reply (R. 21) to the second defense (R. 7) in our answer, in which we alleged that no temporary contract of insurance went into effect because the applicant did not furnish evidence of insurability. In reply to the fourth defense (R. 11) in which we alleged that no temporary insurance went into effect because the applicant could not furnish evidence of insurability on account of his aviation record, the plaintiff (R. 22) alleged that the defendant was estopped to prove the answers of the applicant in the application as to his aviation activities because the defendant did not furnish

the applicant with a copy of the application. This is the only plea of estoppel to the fourth defense.

Now in his brief on the merits he has withdrawn the bald assertion that estoppel was pleaded to these two defenses and contents himself with alleging that he called attention to estoppel in his reply and "pleaded estoppel in one form or another." And he contends that the defendant is estopped from asserting its second and fourth defenses because the agent Bliss told the plaintiff after the applicant's death that the company wouldn't pay because the applicant had not had a physical examination. On the basis of this testimony he seeks to apply the decision in *Farmers Milling Co.* v. *Mill Owners Mutual*, 127 Iowa 315, 103 N.W. 207, that the defendant having asserted one ground of non-liability cannot after suit brought, allege a new ground of defense. This is his so-called "mending his hold" doctrine which he refers to again and again in his brief.

It has always been the rule in Iowa that estoppel must be affirmatively pleaded. See note in 120 A.L.R. 8, where Iowa cases filling a column and a half are cited in support of the rule that estoppel must be pleaded and if not pleaded it is inadmissible to prove it in evidence. Since the note was written the following additional cases support the rule. *In re Lunt*, 235 Iowa 62, 16 N.W.2d 25; *Mensinger* v. *Hass*, 240 Iowa 71, 35 N.W.2d 461, and *Abel* v. *Abel*, 245 Iowa 907, 65 N.W.2d 68. In one of the cases cited in the note, *Eikenberry* v. *Edwards*, 67 Iowa 14, 24 N.W. 570, the Court said that a party is not entitled to introduce evidence tending to prove an estoppel unless he has specially pleaded the facts constituting such an estoppel. And in *Federal Land Bank* v. *Sherburne*, 213 Iowa 612, 239 N.W. 778, the Court said:

> "Even then there is not a sufficient pleading of estoppel. What is pleaded amounts merely to a conclusion. No facts are set forth giving rise to the estoppel. It is not claimed that appellant was misled or in any way changed its position because of any matters stated as an estoppel. More than that, there is no proof that appellant was misled or prejudiced. Nor does it appear that appellant in any way changed its position because of anything said or done by appellee. Without such proof, there can be no estoppel."

We repeat that there is no plea of estoppel to our second and fourth defenses except the specious plea under the Iowa statute requiring that a copy of the application be attached to the policy when issued and barring proof of the application if a copy is not attached. Obviously this statute is not applicable when no policy has been issued. Furthermore, there is no claim that the plaintiff was misled or injured by Bliss' statement to her. It is not alleged that she would not have commenced the suit except for her reliance on the statement made. If the estoppel had been pleaded, the defendant would have had the opportunity to introduce evidence that a denial of liability had been made on other grounds. There is no such evidence in the Record but there was no occasion to offer it in the absence of a proper plea of estoppel. The authority of Bliss to stop the company by any statement of any kind is dealt with in another place in this brief.

Aside from the general rule relating to the necessity of alleging estoppel "with precision, certainty, accuracy and particularity", (See 120 A.L.R. 105, 107) we call the attention of the Court to Rule 8(c) of the Federal Rules of Civil Procedure:

> "In pleading to a preceding pleading, a party shall set forth affirmatively * * * estoppel * * * and any

other matter constituting an avoidance or affirmative defense."

This rule has been applied by the Courts of Appeals in a number of cases such as *Bush* v. *Remington Rand*, (2nd Cir.) 213 F.2d 456, 461; *Cummings* v. *Moore*, (10th Cir.) 202 F.2d 145, 148, where the court said if estoppel is not pleaded, it is waived; *Tornello* v. *Deligiannis Brothers*, (7th Cir.) 180 F.2d 553, 556; and particularly *Wackerle* v. *Pacific Employers Insurance Co.*, 219 F.2d 1, 7, from the Eighth Circuit, certiorari denied 349 U.S. 955, 99 L.Ed. 1279. The opinion in that case was written by the Judge who wrote the opinion in the case at bar and concurred in by the Judge who dissented in the case at bar. The Court said:

> "Appellee further argues that the insured, and consequently the appellants, would be estopped from raising the defense of lack of consideration. Estoppel is not pleaded. This issue does not appear to have been raised in any way in the trial court. Estoppel is an affirmative defense which must be pleaded. Rule 8(c), Federal Rules of Civil Procedure, 28 U.S.C.A. If not pleaded the defense can not be raised on appeal. Mutual Benefit Health & Accident Ass'n v. Cohen, supra, footnote 2, page 234; Cummings v. Moore, 10 Cir., 202 F.2d 145; Tornello v. Deligiannis Brothers, Inc., 7 Cir., 180 F.2d 553."

The footnote in *Mutual Benefit* v. *Cohen*, (8th Cir.) 194 F.2d 232, refers to an estoppel urged by the appellant and says:

> "No such issue was in the court below. It is not for our consideration on this appeal."

There is not a mention of the "mending his hold" estoppel in the Record in the trial court. Counsel complains because the Court of Appeals refused to follow the Iowa decisions on the general law of estoppel and suggests

that the dissenting opinion is based on an estoppel doctrine. There was no occasion for the Court of Appeals to consider any Iowa decisions on estoppel and we cannot find the words "estoppel" or "estopped" in the dissenting opinion. Neither the majority opinion nor the dissent said anything about estoppel because estoppel was not pleaded.

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e. This Court should give weight to the fact that the opinion of the Court of Appeals, based on the law of Iowa, was written by an Iowa judge of long experience as a trial judge in Iowa.

The opinion of the Court of Appeals was written by Judge Martin D. Van Oosterhout. It appears from Who's Who in America for 1956-1957 that he was admitted to the Iowa bar in 1924, and was a judge of the 21st Judicial District of Iowa for eleven years, 1943-1954. The opinion was concurred in by Judge John B. Sanborn, formerly Commissioner of Insurance of Minnesota, who has been a member of the Court since 1932. The trial judge was a resident of Missouri, assigned to the Southern Iowa District Court. This Court has repeatedly held that a holding on a question of state law by a judge who is a resident of that state will ordinarily be left undisturbed.

As stated by Mr. Justice Douglas in *Ragan* v. *Merchants Transfer & Warehouse Company*, 337 U.S. 530, 93 L.Ed. 1520, in referring to a holding of the Court of Appeals for the Tenth Circuit with respect to the law of Kansas:

> "It is argued that the Kansas Statute in question is not an integral part of the Kansas statute of limita-

tions. But the Court of Appeals on a careful canvass of Kansas law in an opinion written by Judge Huxman, a distinguished member of the Kansas bar, has held to the contrary. We ordinarily accept the determination of local law by the Court of Appeals (see Huddleston v. Dwyer, 322 U.S. 232, 237, 88 L.Ed. 1246, 1249, 64 S. Ct. 1015), and we will not disturb it here."

Mr. Justice Reed in *Helvering* v. *Stuart*, 317 U.S. 154, 87 L.Ed. 154, speaking of the decision of a Court of Appeals construing a trust under the law of Illinois said:

"This conclusion does not spring from a statute of that state nor even from a clear or satisfying line of decisions. It is, however, the reasoned judgment of the circuit which includes Illinois in which a judge of long experience in the jurisprudence of that state participated. Without a definite conviction of error in the conclusion, this Court will not reverse that judgment."

And in *Spiegel's Estate* v. *Commissioner*, 335 U.S. 701, 93 L.Ed. 339, which also involved the construction of a trust under Illinois law, Mr. Justice Black said:

"The questioned ruling was made by three judges who are constantly required to pass upon Illinois law questions. One of the three judges has long been a resident and lawyer of Illinois. Examination of the Illinois state court opinions pressed upon us leaves us unable to say with any degree of certainty that the Court of Appeals' holding was wrong. It is certainly neither novel nor unreasonable for state law to provide that when all trust beneficiaries die the trust corpus should revert to the donor. It would be wholly unprofitable for us to analyze Illinois cases on the point here urged. It is sufficient for us to say that we think reasonable arguments can be made based on Illinois cases to support a determination of this question either for or against the petitioner's contention. Under these circumstances we will follow our general

policy and leave undisturbed this Court of Appeals' holding on a question of state law."

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f. There is no conflict between circuits on the question involved.

In his brief opposing counsel repeats almost verbatim the contention made in his petition that there is a conflict between circuits because of the decisions in *Gaunt* v. *John Hancock Mutual,* (2d Cir.) 160 F.2d 599, and *Liberty National Life* v. *Hamilton,* (6th Cir.) 237 F.2d 235. It is obvious in the first place that the courts in these two cases were governed by the law of two states other than Iowa. Furthermore, if we examine these decisions we find that there is no actual conflict.

In the *Gaunt* case, 160 F.2d 599, the receipt was conditioned upon insurability *and* the approval of the application at the home office of the company prior to the applicant's death. The applicant had taken a medical examination and had been found insurable by the medical examiner but was killed before the approval of the application at the home office. The lower court found that the application would have been approved if the company had not been notified of the applicant's death. The substance of the opinion is that the receipt which is entirely different from the receipt in the case at bar was ambiguous and having been prepared by the insurance company should be construed against it.

This case is not in conflict with the case at bar for two reasons: (1) In the case at bar the applicant had not been examined and found insurable and the Court of Appeals

held that it was conclusively proved that he was not insurable for the plan and rating applied for because of his aviation activities. The Court was thoroughly justified in using the word "conclusively" because the only evidence on the subject was that of the Vice-President of the company who testified that in view of such activities the contract would not have been issued as applied for. If issued it would have contained an aviation exclusion clause or provided for an extra premium; (2) no claim was made in the pleadings or in argument that the receipt in the case at bar was ambiguous and any layman reading it would know that it was a conditional receipt and that the two provisos, good health and insurability, had to be complied with. The Court of Appeals said:

> "From our consideration of the authorities heretofore cited, we believe that the Iowa court would not find the conditional receipt ambiguous * * *"

In the *Liberty National* case, 237 F.2d 235, the receipt, although it contained a provision for insurability, was denominated as a "binding receipt" in the briefs and it referred in two places to "*the insurance granted hereunder.*" These words are emphasized by the Court in its opinion. The applicant had a physical examination by the Company's examiner and disclosed his entire medical history and the court found that the examination was satisfactory. There was lay and medical testimony that the applicant was insurable and said testimony was sufficient to raise a question for the jury. Here again the court found ambiguity and resolved it against the Company. It was a Tennessee contract and the court after examining the Tennessee decisions was in doubt as to the local law involving ambiguities as to the time when the insurance would become effective. Certainly the reference to "insurance granted hereunder" would lead the applicant to believe

that he was already covered. In the case at bar the receipt was entitled "Conditional Receipt". It recites that it was made "in connection with an application" for insurance and it refers specifically to the "insurance applied for", not to the "insurance granted hereunder". Furthermore, as stated above, there was no evidence in the case at bar that the applicant was insurable on the date of the receipt. On the contrary the evidence showed that he was not insurable for the plan and rating applied for. No claim of ambiguity was made by the plaintiff.

The decision in the case at bar is in line with the decision of the Court of Appeals for the 10th Circuit in *Mofrad* v. *New York Life*, 206 F.2d 491 and with *Warren* v. *New York Life* in the 5th Circuit, 128 F.2d 671. Counsel complains because the law is different in different jurisdictions and it is undoubtedly true that the law of insurance varies in different states. The same court which decided in favor of the plaintiff in the *Liberty National* case, *supra*, held that there was no temporary contract of insurance in *Bellak* v. *United Home Life*, 211 F.2d 280, unless there was an unreasonable delay in acting on the application, because there it was bound by the law of Michigan. This divergence of opinion in different states is no ground for reversing the decision of the Court of Appeals in this case where it followed the Iowa law.

It seems to us that opposing counsel has taken absolutely inconsistent positions. In one breath he says that the Court of Appeals violated the Erie Railway case rule because it did not follow Iowa law and he refers to the Reynolds case. In the next breath he contends that the federal courts should adopt a uniform rule independently of the law in the several states with respect to conditional receipts. Obviously this is impossible. The receipts used by the various companies are not uniform and the federal

courts in determining the laws of the various states can not adopt a uniform rule when the decisions of the various states may not be uniform. The only way to achieve uniformity (assuming uniformity in the receipts) would be to overrule the Erie case and adopt a federal rule of general law regardless of state decisions. In other words, go back to *Swift* v. *Tyson.*

Division II.

The conditional receipt was not in itself a contract for temporary insurance but merely a receipt given in connection with Part I of an application for life insurance stating the terms upon which the insurance would be effective from date if the conditions therein were fulfilled. It should not be considered alone but with said application, and as said application was never completed by taking a medical examination and the minds of the parties never met, no contract of insurance, temporary or permanent, ever went into effect.

The Court of Appeals held that the defendant was entitled to a directed verdict because the conditional receipt was conditioned upon insurability and the proposed insured was not insurable for the plan and rating applied for. In view of its decision on this point it did not consider the other questions raised by the defendant in its motion for directed verdict. Par. 1 of said motion (R. 55) reads as follows:

> "1. The conditional receipt offered in evidence, and alleged to be a contract of insurance is not a contract, but a receipt delivered to evidence the payment of a first premium in connection with an application for life insurance, and the terms upon which the first

premium was paid. It was merely a part of a transaction which constituted an application for life insurance. Said application was not completed and was not accepted by the defendant, and there was no meeting of the minds of the parties to form a contract."

It is the law of Iowa and the general rule that if there are any grounds in the record upon which a court's ruling can be sustained an appellate court should follow the trial court even though it based its holding on some other ground. See *Lewis* v. *Minnesota Mutual*, 240 Iowa 1249, 37 N.W.2d 316, and other Iowa cases cited therein. The same rule is applicable to the decision of an intermediate appellate court. Even if we were to concede for the purpose of argument that the Court of Appeals was wrong in holding that the company was entitled to a directed verdict under the Iowa law relating to receipts conditioned upon insurability as laid down in *Reynolds* v. *Northwestern Mutual*, 189 Iowa 76, 176 N.W. 207, its direction to enter judgment in favor of the defendant should be affirmed if the defendant was entitled to a directed verdict under the first ground of the motion as stated above or any other ground of said motion not considered by the court.

To understand the receipt it is necessary to read it with the application. It recites that it was made *in connection with an application* made this day to the defendant for insurance. It refers to the insurance *applied for* and it expressly contemplates that the application may be declined and the amount paid refunded (Emphasis ours). The application provides that if the first premium is paid with the application, the insurance shall take effect as stipulated in the Conditional Receipt (R. 19). The District Judge said that the receipt by itself was a temporary contract of insurance conditioned only upon the first proviso, namely the proposed insured's good health on its date.

He ignored entirely the second proviso referred to above and said that the application could be disregarded completely. This is not the law. In view of the language in the receipt referred to above, the receipt and the application should be considered together as parts of one transaction, namely, an application for life insurance.

In *Himes* v. *Metropolitan*, 207 S. C. 420, 36 S.E.2d 137, where the receipt recited that it was made in connection with an application, the court said:

> "The application and receipt must be construed together and constitute a written agreement between the parties."

To the same effect is *Cooksey* v. *Mutual Life*, 73 Ark. 117, 83 S.W. 317, where the court held that the application and receipt should be read together and *Jenkins* v. *International Life*, 149 Ark. 257, 232 S.W. 3, where the court said:

> "The application and the receipt each contain provisions which show that the receipt must be considered in connection with and as a part of the application."

And in *Pace* v. *Provident Savings Life*, (5th Circuit) 113 Fed. 13, in a brief *per curiam* opinion, the court held that if the receipt for the first premium is considered as a binding receipt, still it must be construed in connection with the application.

The holding of the District Judge that the application could be disregarded and the receipt relied upon as the sole contract is absolutely inconsistent with his holding as to the right of the plaintiff to recover in her individual capacity. It will be remembered that the petition was in four counts. In the first two counts the plaintiff sued as administratrix of her husband's estate. In the last two

counts she sued in her individual capacity repeating the allegations of Counts I and II and further alleging that she was the beneficiary in the application. The District Judge withdrew Counts I and II from the jury and held that if she was entitled to recover she was entitled to recover individually under Count IV. But if she was entitled to recover individually her sole right to recovery was based on the fact that she was named in the application as beneficiary. Yet the court said the application had nothing to do with her right of recovery. Almost this same situation arose in *Maddox* v. *Life and Casualty Co.*, 79 Ga. App. 164, 53 S.E. 2d 235. Suit was brought by the beneficiary named in the application. In her first count she sued on the receipt, and she contended on appeal from a demurrer dismissing her suit that the action was on the receipt alone. The Court said:

> "It is only necessary to again call attention to the facts that in the receipt the plaintiff is not named as beneficiary nor is any amount of insurance provided for. If there was a cause of action on the receipt, it was not in the plaintiff. It is plain that the plaintiff had no cause of action without consideration of the application and that examination of the application was necessary to determine whether she had or not."

In the case at bar the District Judge went to Part I of the application to hold that it was the plaintiff individually who had the right to recover because she was named as the beneficiary in the application (R. 54), but ignored Part I of the application completely by holding that the receipt was the only contract. If the receipt was a contract, which of course we deny, then the right of recovery would be in the administratrix. If the receipt and Part I of the application are considered together, as they should be considered, they constitute one transaction, namely a partial application for life insurance, to be completed by a medical

examination and forming no basis for a contract until so completed.

The blank receipt in the case at bar was originally a part of Part I of the application and was detached therefrom and given to the proposed insured (R. 34-35). Immediately above his signature on Part I of the application (R. 19) appears this agreement: "It is Hereby Agreed that this Application including Part II a copy of which shall be attached to the Policy when issued, shall become a part of every Policy issued hereon." This language in itself was notice to the applicant that the application was incomplete. It is also clear from the record that the applicant was orally notified that a medical examination was necessary and an appointment was made for it (R. 34). The failure to take it was not due to any fault or neglect on the part of the defendant or its agent. The fact that the appointment was never met because of the death of the proposed insured does not mean that the examination was waived or the failure to take the examination excused. It simply means that through no fault of the defendant the application was never completed.

In *Beyer* v. *Central Life*, 199 Iowa 245, 201 N.W. 577, the conditional receipt required that the application be accepted and a policy issued and delivered before the insurance would go into effect. The application was in fact rejected and the main issue in the case was whether the company was estopped to deny liability because of a statement by the agent that the application had been accepted. The court had this to say about the general question under discussion in this division of our brief:

> "But there can be no valid and enforcible contract without, at least objectively, a meeting of the minds of the parties. The application for a policy of insurance is, in legal effect, an 'offer' on the part of the applicant.

> The offer must be accepted in some manner by the company, before it can be bound to issue its policy of insurance. The subject-matter of the contract between the parties is the policy of insurance; but the contract for such a policy is made as all other contracts are made—by an 'offer' by one party and an 'acceptance' by the other."

In *Muhlbach* v. *Omaha Life*, 107 Neb. 206, 185 N.W. 447, the applicant paid the first premium and stated in the application that there never had been any insanity in his family. The application provided: "I * * * hereby apply to Omaha Life Insurance Company for a policy on the twenty pay plan." Similarly in the case at bar the receipt referred to payment made "in connection with an application" to the defendant for insurance of $10,500 and referred in the following paragraph to "The Insurance applied for". The Nebraska court said with respect to the above provisions:

> "The applicant applied for a policy instead of a contract of insurance to become effective before the issuance of a policy."

The company acknowledged receipt of the application and premiums and wrote the applicant that upon the receipt of the medical and approval the policy would go forth. The applicant was in good health at the time. However, he left the office of the medical examiner before the examination was completed and never returned. Four days later he was found dead. The Court held that there was no contract of insurance and said:

> "Both insurer and applicant, in negotiating for life insurance, should contemplate an investigation sufficient to disclose all facts essential to an insurable risk and to reputable underwriting, since this is required by honest business and common sense. If these tests

> could be safely used in determining the amounts of annual premiums, policyholders and insurers generally would be alike benefited. Part of the applicant's consideration for life insurance on the twenty-payment plan failed—disclosure of physical conditions and family history. As a result, the risk was not approved and the policy was never issued. A life insurance risk, before the issuance of a policy for which an application has been made, is not assumed until the minds of both applicant and insurer meet on definite terms to that effect."

The Nebraska court also referred to the provision in the receipt to the effect that if the policy is not issued, the amount receipted for would be returned. A similar provision is in the receipt in the case at bar. The court said with respect to this:

> "This receipt not only gave notice to the applicant that the premium was accepted on condition of the medical director's subsequent approval of the insured, but it contained a definite promise to return the amount of the premium paid, 'if the policy as applied for shall not be issued'. Having thus agreed in advance to return all the premiums paid, if the policy should not be issued and the policy without fault of the defendant, not having been issued, no consideration whatever remained for insurance of a temporary nature during the time intervening between the date of the application and the approval or rejection of the risk on the twenty-payment plan. There was therefore no agreement or consideration for present binding insurance."

As bearing on the necessity for a medical examination we also refer the Court to *Mofrad* v. *N. Y. Life,* (10 Cir.) 206 F.2d 491, cited by the Court of Appeals in the case at bar, *Paulk* v. *State Mutual,* 85 Ga. App. 413, 69 S.E.2d 777, and *Corn* v. *United American Life,* (D.C. Colo.) 104 Fed. Supp. 612.

We contend that under the fundamental rules of contracts as laid down in the above cases there is no contract until there has been a meeting of the minds. There must be an offer and an acceptance and there must be a complete offer before there can be an acceptance. Part I of the application in the case at bar was part of an offer, but it was not complete because there was no medical examination. The offer was therefore never communicated to the defendant at its home office where it had to be acted on and there was no acceptance. The minds of the parties never met.

Division III.

The words "Immediate Coverage" written on the conditional receipt by Agent Bliss under the amount of the insurance applied for, namely $10,500, added nothing to the effect of the receipt, but if these words are construed as the agreement of Bliss to create an immediate contract for temporary insurance and to waive the provisos in the receipt, said contract was not binding on the defendant because Bliss had no authority to make contracts of insurance for the defendant.

It is the contention of the plaintiff as set forth in Count I of the petition (R. 2 and 3), made by reference a part of Count IV, that the receipt itself was a contract of temporary insurance because of the insertion of the words "Immediate Coverage" written on the receipt with pen and ink by Agent Bliss. It is the contention of the defendant that the addition of those words added nothing to the legal effect of the receipt and if construed to make it a contract of temporary insurance effective immediately, it was not binding on the defendant because of Bliss' lack of authority.

With regard to the words "Immediate Coverage" the trial judge told the jury he gave no consideration to those words at all, because the language of the receipt "The insurance applied for shall be in full force and effect from this date" meant the same thing as "immediate coverage." (R. 66). We contend that the Record shows that these words should be construed to indicate the initial death benefit. If, however, the conditional receipt means what opposing counsel says, it means that the insurance went into effect on the date of the receipt regardless of the construction given to the words. The Court of Appeals also held that the addition of those words did not change the meaning of the contract. It said: "The conditions were not eliminated from the receipt, nor were they expressly waived. The conditions remained a part of the receipt as delivered. We do not believe it can fairly be said that the addition of the words 'Immediate Coverage' was intended to eliminate the conditions. Under such a construction of the contract as a whole we do not reach the serious question of the authority of the agent Bliss to alter the receipt or to agree to immediate unconditional coverage." (R. 90, 91).

Paragraphs 4 and 5 of the motion for directed verdict read as follows:

> 4. The insertion of the words "immediate coverage" below the amount of insurance applied for in the conditional receipt does not convert the receipt into a contract of temporary insurance in view of the fact that a decreasing term policy was applied for, and the proposed insured was advised that the amount of insurance in the first year was $10,500, and would decrease annually thereafter.
>
> 5. If said receipt is construed to be a contract of insurance because of the addition of the words "immediate coverage" under the amount of insurance applied for, said contract is not binding on the de-

fendant because the agent, Bliss, had no authority to make, alter or discharge any policies, contracts or agreements on behalf of or in the name of the company, or, to waive any forfeitures, or, except as otherwise agreed to in writing by a duly authorized officer of the company, to incur any obligations or liability for which the company should be responsible.

As noted above the Court of Appeals did not pass on this point but if the motion should have been sustained on this ground, the decision of the Court of Appeals directing judgment for the defendant, should be affirmed.

The testimony of agent Bliss shows that the words "Immediate Coverage" written by him on the receipt were intended to refer to the initial amount of insurance applied for (R. 35). The policy was a decreasing term policy and the face amount would be reduced from year to year at the rate of $500 per year. The policy had been explained to the applicant and he wanted the decreasing term policy to take care of the decreasing balance of a mortgage on his home, payable in installments. The printed form of receipt had no space to describe the policy in detail and if the amount had been written $10,500 without some explanation, it would have appeared on the face of the receipt that the applicant had applied for a fixed amount of $10.500 of insurance.

Furthermore we call the court's attention to the place where the words were inserted, namely directly under the figure "$10,500". There was no reason for inserting the words at that particular place unless it was to emphasize the initial or immediate amount of coverage which was $10,500, but which would not remain at $10,500 during the expected duration of the decreasing term policy.

Even assuming that Bliss intended to violate his agency contract and to change the receipt by eliminating the pro-

visos, he would have written "Immediate Coverage" across the top of the receipt or stricken out the provisos with pen and ink. He testified:

> "I made it a point of making it crystal clear to Mr. Hinkle that this was decreasing term insurance, that the $10,500 was not a permanent situation, and as I have explained to the court and jury it decreases each year. That is the reason why I wrote it in the receipt, I put that in so there would be no misunderstanding at all on the part of Mr. Hinkle. I told Mr. Hinkle why I put that in and wrote it out so there is no possible chance of any misunderstanding." (R. 35).

However, if we are wrong about this construction of the phrase and if the words "immediate coverage" are construed by the court to mean that the agent agreed that the insurance would be in effect from the date of the receipt without any medical examination, such an agreement was not binding on the defendant.

In *Beyer* v. *Central Life*, 199 Iowa 245, 201 N.W. 577, the application was actually rejected by the company at its home office but the agent wrote the plaintiff who was to be the beneficiary in the policy applied for by his wife and told him that she had been accepted and that he would be over in the near future and deliver the policy. The applicant died about six weeks later without knowing that the application had been rejected. The court held that the defendant was not bound by the act of the agent and said:

> "Appellant contends that the act of the agent was, in effect, the act of the principal, and bound the principal thereby. It is hornbook law that a principal can only be bound by the acts of his agent within the scope of the authority conferred upon the agent, either expressly or impliedly. It never has been and cannot be the law that a principal can be bound by the acts

of its agent which are not only unauthorized, but are directly contrary to the authority conferred, where no question of estoppel is involved."

A number of fire insurance cases can be found where the courts hold that a mere soliciting agent cannot bind the company by an agreement making the insurance effective but that a general agent can. That is because a general agent of a fire insurance company can issue contracts and bind the company immediately by putting it on the risk. A general agent of a life insurance company cannot make contracts of insurance, and so far as his authority to make and alter contracts of insurance is concerned, he has no greater authority than the soliciting agent of a fire insurance company.

While it is true that Bliss was referred to as general agent in his contract of agency and given the power to appoint agents the scope of his authority and the limitations of his authority are specifically stated in his contract as follows (R. 37):

"SECTION 1.

SCOPE OF AUTHORITY.

The General Agent is hereby authorized to appoint and contract with Agents and Brokers, to procure, personally and through such Agents and Brokers, applications for policies and to forward them to the Home Office of the Company for consideration, and to deliver policies and premium receipts, upon payment of the amounts specified therein and upon compliance with the terms and conditions governing such delivery.

SECTION 2.

LIMITATION OF AUTHORITY.

The General Agent is expressly forbidden to make, alter or discharge any policies, contracts or agree-

ments on behalf of, or in the name of the Company, or to waive any forfeiture, or, except as otherwise agreed to in writing by a duly authorized officer of the Company, to incur any obligations or liability for which the Company shall be responsible."

These provisions of his contract plainly show that he had the same authority as the soliciting agents referred to in the following cases. For instance, in *Sommerio* v. *Prudential*, 289 Ill.App. 520, 7 N.E.2d 631, the receipt was conditioned upon the approval of the application at the home office of the defendant. The agent in question was an assistant superintendent at an office of the defendant in Chicago and he had authority to take applications, collect premiums, forward applications to the home office and deliver policies when issued. His authority was practically identical with that of agent Bliss in the case at bar. He testified that he told the applicant that the policy would take effect upon the date of the receipt. The court held that his agreement was not binding on the defendant and that it was incumbent on the plaintiff to show the specific authority claimed.

Further cases on the power of an agent with limited authority to bind the company to contracts of insurance are *Patterson* v. *Prudential*, (Mo. App.) 23 S.W.2d 198, cited by the Illinois Court in the Sommerio case referred to above, *Arnold* v. *Life and Accident Insurance Association*, 30 Tenn. App. 166, 204 S.W.2d 191, certiorari denied by Supreme Court, and *Missouri State Life* v. *Boles*, (Tex. C.A.) 228 S.W. 271.

We want to emphasize the fact that the conditional receipt itself brought home to the proposed insured the lack of authority of Bliss to make contracts of insurance for the defendant. It specifically provides for the furnishing of evidence of insurability to the defendant at its home of-

fice and for the determination by the Company of the insurability of the proposed insured. It tells the proposed insured to notify the Company at Boston if he does not hear from the Company within sixty days. These provisions of the receipt put Hinkle on notice that Bliss had no authority to determine insurability. It had to be done at the home office in Boston.

In *Basinsky* v. *National Casualty Co.*, 122 Wash. 1, 209 Pac. 1077, the application for an accident insurance policy provided that it would not be binding on the company until accepted at the home office or by an agent duly authorized to issue policies. The receipt was given for the first premium which provided that if the company declined or failed to issue a policy within twenty days the premium would be returned. Before the policy could be issued the applicant was injured and he was permitted to testify that the agent told him he was protected from the date of the receipt. The Supreme Court held that the applicant was bound by the provision of the application to know that the agent could not accept the application and he had no right to rely on any such statement by him since the application by necessary inference showed he had no such authority. By the same token Hinkle was bound to know that Bliss had no power to approve his application and if "Immediate Coverage" is construed to mean a promise by Bliss that the insurance went into effect at once that promise is not binding on the defendant.

See also *State Life Insurance Company* v. *Thiel*, 107 Ind. App. 75, 20 N.E.2d 693, *Mutual Benefit* v. *Edwards*, 174 Okla. 210, 50 P.2d 144, and *Harris* v. *Mutual Benefit*, 187 Ark. 1038, 63 S.W.2d 975.

In a case recently reported, *Botts* v. *Shenandoah Life*, (Fed. D. C. Va.) 134 Fed. Supp. 893, involving the author-

ity of an agent to promise a certain dividend, the court made the distinction between life insurance agents and other insurance agents which we have referred to above. The court said:

> "The authority of a life insurance agent is very different from that of a fire or casualty insurance agent. As is generally known, the latter may, and universally does, make binding contracts of insurance for his principal; on the contrary, a life insurance agent may only take applications for life insurance and is never authorized to actually make contracts."

This distinction is recognized by statute in Virginia but is a valid distinction in the absence of statute.

On the point covered in this division of our argument opposing counsel cites three Iowa cases. *McDonald* v. *Equitable Life Assurance Society*, 185 Iowa 1008, 169 N.W. 352, involved a life insurance policy and the authority of an agent to waive a lapse. The facts are entirely different from those in the case at bar, and the discussion of the authority of the agent is dictum because the court held that the act of the agent was ratified by the defendant. *Nertney* v. *National Fire Insurance Co.*, 199 Iowa 1358, 203 N.W. 826, was a fire insurance case and *Boever* v. *Great American Ins. Co.*, 221 Iowa 566, 266 N.W. 276, was a hail insurance case which followed the Nertney decision. In the *Nertney* case, the court held that when it is shown that it is the custom of the company upon accepting the application to issue its policy covering the period from the date of the application, its agent taking the application has implied or apparent authority to make a valid preliminary contract of insurance effective from the making of the application until its acceptance or rejection. In an effort to bring this case under the same rule counsel refers to a provision on the back of the application in the case at bar,

Exhibit D, to the effect that when the premium is paid in advance, the policy will usually bear that date *if issued as applied for* (Emphasis ours). He also refers to the testimony of the company's vice president to the effect that the premium date is on some occasions the date of the application, and that in the case at bar if the policy had been issued as applied for within a very short space of time it would have been dated the date of the application.

Counsel contends that with this evidence the rule in the *Nertney* case applies to the case at bar. It is clear that if Hinkle had been examined and found in good health and there had been no question about his insurability in other respects, a policy would have been issued. As the receipt provided that the insurance would be in effect from its date if the provisos were complied with, it would be perfectly natural and logical to date the policy the date of the receipt. We cannot see how this practice gave an agent of the defendant, Bliss, express or implied authority to waive the provisos in the receipt. The same situation existed in the *Reynolds* case, 189 Iowa 76, 176 N.W. 207, discussed in Division I, b, of this brief. As the Court held in that case, if the application had been accepted, the insurance would have become effective from the date of the medical examination. But as the applicant was not insurable on that date, no temporary insurance became effective. Furthermore, the *Nertney* case is a fire insurance case and all the authorities cited in the opinion are fire insurance cases. Counsel ignores the vital difference between the fire insurance business and the life insurance business.

The whole business of fire insurance is based upon immediate binders. When a man acquires a house or an automobile, he wants it covered right then, not at some time in the future. If he is not covered immediately and

his house burns down before the policy is effective, he is out of luck. He has received absolutely no benefit for any premium which he may have paid in advance for the period from the date of payment to the date of coverage. But in life insurance if the premium is paid in advance and the receipt is conditioned on the insurability of the applicant, he does get something. If he is insurable then, he is covered if his death occurs or his health changes after the date of payment. His insurability does not have to be approved before his death. If he is not insurable, he never is covered, and he has no right to be covered.

The testimony of Bliss that he wrote the words "Immediate Coverage" to make it "crystal clear" that this was decreasing term insurance (R. 35) was not offered as parol testimony to vary the terms of the written contract. It was not offered as a construction of the receipt on account of its ambiguity because there was no ambiguity in the receipt. Opposing counsel makes no claim of any such ambiguity in his pleadings or argument. The testimony was offered as an explanation of why the language was used. If this language was a variance of the other terms of the receipt, which we deny, it was not binding on the defendant because Bliss had no authority to make or alter contracts on behalf of the defendant under the authorities cited.

The plaintiff contends that the defendant is estopped from asserting that Bliss had no authority to bind it by a temporary contract of insurance because it never asserted said defense before filing its answer in the case. There is no evidence in the record that the defendant as such ever asserted any of its defenses before its answer although the court will assume that there must have been a denial of liability before the action was commenced. The plaintiff testified that Bliss told her over the telephone that they wouldn't pay because there had been no physical examina-

tion (R. 29). Bliss had no authority to bind the defendant by any statement that would estop it or enlarge its liability under the conditional receipt. No statement by an agent could estop his principal from asserting the lack of authority of the very agent who is making the statement.

The burden of proof was on the plaintiff to prove Bliss' authority. The only evidence in the Record as to his authority is his contract of agency. Adopting the plaintiff's theory of the case, that the addition of the words "Immediate Coverage" created an immediate contract of insurance and waived performance of the provisos in the receipt, the defendant was entitled to a directed verdict because the act of Bliss was not binding on it.

Division IV.

There was never a complete application for life insurance for the further reason that Section 508.28 of the Code of Iowa prohibits the issuance of any contract of life insurance in an amount in excess of $10,000 until a satisfactory medical examination shall have been passed and approved by the medical examiner or medical board of the company, and because of the failure of the proposed insured to have such medical examination, he failed to make a complete application on which a valid contract of insurance could be made. Any attempted contract of temporary insurance made in violation of the statute would be invalid.

We call the Court's attention to grounds 6 and 7 of the motion for directed verdict (R. 56, 57). They read as follows:

> "6. If said receipt is construed to be a contract of insurance, it is not a valid contract under the laws of Iowa because the defendant was prohibited by the

statutes of Iowa from issuing contracts of insurance in an amount more than $10,000 without a medical examination duly passed and approved by the medical examiner or the medical board of the company. Section 508.28 of the Code of Iowa, 1954, requires or contains this language: 'The Commissioner of Insurance shall decline to approve any form of policy unless issuance is based upon the satisfactory medical examination of applicant by a physician, and no policy or contract shall be issued by any insurance company to any individual until such examination has been passed and duly approved by the medical examiner or the medical board of the company.' And then in a subsequent section there is a provision that non-medical insurance may be issued up to $10,000."

"7. It appears from the record that there was no medical examination because of failure of the proposed insured to have an examination. Therefore, he failed to furnish an application upon which the defendant, under the law of Iowa, could insure his life for $10,500."

These two paragraphs should be read together as one ground of the motion.

The Court of Appeals did not pass on this ground. It said in its opinion:

"The conditional receipt on the basis of the words it contains can not fairly be construed to add the medical examination as an additional condition precedent. Whether by implication of law such a condition is to be read into such receipt because of Section 508.28 of the Code of Iowa 1954, prohibiting the issuance of a policy of life insurance for more than $10,000 until a satisfactory medical examination shall have been passed and approved by the medical examiner or medical board of a life insurance company, raises an unsettled question of Iowa law upon which we deem it unnecessary, and hence, inadvisable to express an opinion."

We contend that the motion for a directed verdict should have been sustained on this ground and we say again that conceding for the purpose of argument that the Court of Appeals erred in its decision with respect to the Iowa law on a receipt conditioned upon insurability, the case should not be reversed if the ground stated in paragraphs 6 and 7 above was a valid ground for such direction.

Section 508.28 of the Code of Iowa 1954 reads as follows:

"508.28 Policy provision for medical examination

The commissioner of insurance shall decline to approve any such form of policy or contract of insurance unless the same shall, in all respects, conform to the laws of this state applicable thereto, and unless the issuance of the same is based upon a satisfactory medical examination of the applicant by a physician duly authorized to practice medicine or by an osteopathic physician duly authorized to practice osteopathy in the state of Iowa or the state where examined, and no policy or contract of insurance shall be issued by any insurance company to any individual in this state until such examination shall have been passed and duly approved by the medical examiner or medical board of such company.

Provided that medical examination of the applicant as condition precedent to approval of policy forms shall not be required in the case of juvenile and industrial policies, and policies in amount of ten thousand dollars or less and additional insurance without medical examination may be issued in an amount not to exceed ten thousand dollars subsequent to the issuance of any policy on said life after medical examination; policies so written shall be incontestable for any reason except for nonpayment of premiums after two years from date of issue."

Aside from the express notice to the applicant of the necessity of having a medical examination, as shown by the evidence, he was bound by the provisions of the above statute to know that no contract of insurance could be issued to him unless he passed a satisfactory medical examination which was duly approved by the medical examiner or medical board of the defendant. By his failure to have such examination he failed to present to the defendant an application upon which it could under the law of Iowa issue him a policy for $10,500.

We have not been able to find a court decision involving this particular statute and its effect upon a conditional receipt such as is involved in the case at bar. However, prohibitive statutes of the same general nature have been applied by the courts in cases where the plaintiff claimed on a temporary contract of insurance. For instance, in *Pralle* v. *Metropolitan*, 346 Ill. 58, 178 N.E. 371, the plaintiff claimed that the defendant entered into an oral contract of accident insurance with her husband. Illinois has a statute similar to Section 508.25 of the Iowa Code which provides that it shall be unlawful for any life insurance company to write or use any form of policy or contract of insurance until a copy of such form or contract has been filed with and approved by the commissioner of insurance. The Illinois statute provides that no accident policy shall be issued until a copy of the form shall have been filed with the insurance superintendent, and provides a standard form of policy. The defendant contended that the alleged contract of insurance declared upon could not be lawfully issued under the Illinois statute. The court upheld this contention and said:

> "It seems clear, therefore, that it is the intent and purpose of the act that oral contracts for accident and casualty insurance of the character here claimed are prohibited."

An Oregon statute requires a fire insurance policy to contain certain standard provisions. In *Salquist* v. *Oregon Fire Relief Assn.*, 100 Ore. 416, 197 Pac. 312, the plaintiff claimed that an existing fire insurance policy had been renewed by an oral agreement with an agent of the defendant. The court said:

> "Under this statute it could not be lawfully within the contemplation of the parties that any liability should inure against the defendant except upon a contract such as the law prescribes. In other words, requiring, as it does, that any policy, whether original or a renewal, shall contain the statutory conditions, the enactment in question prescribes an exclusive evidence of contract, analogous to such enactments as the statutes of frauds. Oral contracts of insurance are impossible under our statute."

In *Munhall* v. *Travelers,* 300 Penn. 327, 150 Atl. 645, the plaintiff claimed as beneficiary under an alleged oral contract of life insurance made by the defendant's agent to the effect that if the applicant passed the physical examination and paid the premium the defendant would insure him. The examination was satisfactory and he paid the premium. The court held that there was no contract because the application had not been accepted and no policy issued, but went on to say:

> "We are of the opinion that, in addition to what has been said as to the plaintiff's inability to recover, a statute not referred to in the brief on either side in terms prevents oral contracts of life insurance in this state. The act * * * provides: 'Policies of Insurance, made or entered into by any * * * company, may be made either with or without the seal thereof, and they shall be subscribed by the president, or such other officer as may be designated by the directors * * * for that purpose, and * * * attested by the secretary * * * and, when so subscribed and attested, shall be obliga-

> tory on the company' and its effect is that all contracts of life insurance must be in writing (a wise and salutary requirement to prevent fraud), that they shall be subscribed by the president of the company or some other designated officer and be duly attested, 'and, when so subscribed and attested, shall be obligatory on the company.' Under this language a contract of insurance not in writing is not obligatory on the company. Section 410 of the Act of 1921 (West's Supplement, p. 548, Sec. 12490b-410), which stipulates that no policy shall be issued or delivered unless it contains uniform provisions there specified, clearly implies that all contracts of life insurance must be in writing."

Applying the reasoning of these decisions to the case at bar it is clear that the proposed insured is conclusively presumed to have known by reason of the Iowa statute that the issuance of a policy without a medical examination in a sum in excess of $10,000 was prohibited by law and that the defendant could not have passed on his application unless the report of the medical examination was made a part of it. As stated in the *Munhall* case, *supra*, 150 Atl. 645, on page 647, the applicant knew from the language of the receipt that the application had to go to the home office of the defendant in Boston before being acted on, and he knew from the language of the application that Part II of the application was to be a part of any policy issued thereon. He must have known that a temporary contract of insurance to take effect before the medical examination was prohibited by the Iowa law, and he must have known that there could be no insurance in effect until he had completed the application by taking the medical examination. The defendant was prohibited by the Iowa statute from entering into any contract of insurance until satisfactory report of the medical examiner had been received and approved by it at its home office.

We contend that under the Iowa statute prohibiting the issuance of a policy of life insurance for more than $10,000 until a medical examination shall have been passed and duly approved by the medical examiner or medical board of the company, no valid contract of insurance oral or in writing, temporary or permanent, would be valid for the amount applied for in the case at bar when there was no medical examination whatever. The proposed insured is bound to have known that he could not get a valid policy from the defendant without a medical examination and by his failure to furnish such examination he failed to make a complete and valid application. A temporary contract for life insurance in violation of the statute would not be binding on the defendant.

It is asserted by counsel that if the law was violated it was violated by the defendant through its agent and that the defendant is estopped from claiming any benefit from its own wrong. The same could be said with equal force about the various contracts held invalid in the cases cited above, but nevertheless said contracts were held invalid.

Division V.

Alleged Violation of Plaintiff's Rights under 5th and 7th Amendments.

We confess that we have some difficulty in understanding the contentions of opposing counsel that the plaintiff's rights under the 5th and 7th Amendments to the Constitution have been violated. Obviously he is referring to the provision of the 5th Amendment to the effect that no person shall be deprived of property without due process of law and to the provision of

the 7th Amendment that the right of trial by jury shall be preserved and no fact tried by a jury shall be otherwise reexamined in any court of the United States than according to the rules of the common law. No decisions of this court or any other court are cited in support of his contentions. As we understand them, they are as follows:

1. That the Court of Appeals violated the plaintiff's right to due process of law under the 5th Amendment in the following particulars:

(a) By trying a law action *de novo* on appeal.

We cannot conceive how it can be claimed that this case was tried *de novo*. The essence of the decision in the Court of Appeals is contained in the third paragraph from the end (R. 96) where the court says:

> "The defendant was legally entitled to have its motion for directed verdict sustained upon the basis that the insurance was not in effect at the time of the applicant's death for the reason that the applicant did not and could not meet the insurability condition set out in the conditional receipt because of his aviation pursuits."

The motion for directed verdict raised this question directly. The court did not try *de novo* any question of fact determined by the jury. It passed on the undisputed evidence and held that there was no question for the jury.

(b) By holding that the defendant's evidence conclusively showed something the defendant never claimed in pleading or evidence or errors assigned on appeal.

Counsel refers to this statement in the opinion (R. 96): "The evidence conclusively shows that the proposed insured because of his aviation activities was not insurable for the amount, plan and rating applied for and that the

defendant made a good faith determination that he was not so insurable." The first clause of this statement is absolutely correct. See testimony of the defendant's vice-president (R. 47, 48) to the effect that an applicant with an aviation record such as Hinkle's would have had to modify the policy applied for by the addition of an aviation exclusion clause or would have had to pay an extra premium. The second clause of the quoted statement is immediately qualified by the discussion in the following paragraph showing that the information as to the applicant's aviation activities would have warranted the defendant's determination that the applicant was not insurable upon receiving the completed application. The statement in the opinion to which counsel objects was not vital to the ultimate decision of the court as stated in Par. 1(a) above. Counsel has absolutely no basis for his assertion that the court went outside the grounds stated in the motion and tried a different law suit than the one presented.

(c) By passing on errors not assigned.

This refers to the statement in the opinion that the trial court erred in holding that good health and insurability are practically synonymous. The case was not reversed because of this holding. The statement was merely made to show the error of the trial court in ignoring the second proviso in the receipt requiring evidence of insurability.

(d) By denying the plaintiff a jury trial.

Surely it cannot be argued seriously that when a case is tried before a jury, and the appellate court holds that as a matter of law there was no question of fact to be decided by a jury, the plaintiff has been denied due process under the 5th Amendment. His right to trial by jury under the 7th Amendment is discussed below.

(e) By admitting evidence over plaintiff's objection in violation of the parol evidence rule and of Sec. 511.34 of the Iowa Code and holding such evidence conclusively true and directing a verdict thereon.

This in itself is meaningless but as nearly as we can determine counsel is referring to the admission in evidence of the application signed by Hinkle and the testimony of Bliss as to his negative answers as to his aviation record. The application was admissible as part of the same transaction as the receipt under the authorities cited in Division II above. The Iowa statute printed as an Appendix to the petitioners' brief on page 48 requires a copy of an application to be attached to a policy when issued and provides that failure to attach the same bars the company from proving the application. Obviously this statute cannot possibly apply to an application where no policy whatever had been issued. The purpose of the statute is to remind the applicant of the statements made by him and the bar of the statute applies when an insurer is defending an action on a policy by claiming it was obtained by false representations in the application.

The assertion by counsel that the Court of Appeals held that Bliss' testimony was conclusively true is a gross misstatement of the record. There is no such holding in the opinion. The Court did say with respect to Bliss' testimony: "We have serious doubt whether there is any substantial evidence to the contrary", but that is far from holding that the testimony was conclusively true. In any event the court went on to hold that the question of who was responsible for the false answers as to aviation was of no importance on the appeal. So that whatever was said about the testimony had no bearing upon the ultimate decision and certainly was no violation of the due process clause.

(f) By rewriting the clause containing the words "rating applied for."

No mention of this point is made in the petition for the writ and under Rule 40(d)(2) points not raised by the petition cannot be raised in the brief on the merits. The testimony of the defendant's vice-president (R. 48) is that with an aviation record such as Hinkle's the policy would not have been issued as applied for. The defendant would have made a counter offer giving the applicant the choice between an aviation exclusion clause and an extra premium.

2. That the Court of Appeals denied plaintiff a jury trial as guaranteed by the 7th Amendment:

(a) "By holding that evidence offered by defendant of a transaction with a man deceased was conclusively true and more especially when defendant's witness was contradicted on all his details by two other witnesses and when the physical appearance of defendant's exhibits contradicted defendant's witness and where the facts testified to were contrary to human nature."

This seems to us to be an extraordinary contention. Counsel is again referring to Bliss' testimony that Hinkle gave him the false answers to the aviation questions and that he wrote them on the application before Hinkle signed it (R. 33). The alleged contradiction is the testimony of a fellow employee, Mrs. Hansen, who said she didn't hear any mention of aviation but she didn't pay much attention to the conversation (R. 35) and another employee, Evans, who didn't hear anything said by Bliss and Hinkle (R. 53). This is hardly a contradiction "on all his details." The physical appearance of the application Exhibit D, a photostatic copy of which is in the Record (19) throws absolutely no light on the question. We don't know what counsel means by the facts being contrary to human na-

ture. He again makes an unabashed misstatement of the record by asserting that the Court of Appeals held that Bliss' testimony was conclusively true. In any event as we have shown in Paragraph 1 (e) above, the truth or falsity of the statements had no bearing upon the ultimate decision of the case by the Court of Appeals. The decision did not deny the plaintiff a jury trial on an issue of fact. It held in substance that there was no fact issue to be decided by the jury.

3. "That the majority procedure was not by the rules of the common law as required by the 7th Amendment."

As stated by Mr. Justice Frankfurter in a foot note to his separate opinion in *Rogers* v. *Missouri-Pacific,* 352 U.S. 524, 1 L.Ed.2d 520, 530, "Any notion that the practice of directing verdicts offends the Seventh Amendment was laid to rest in *Galloway* v. *United States,* 319 U.S. 372, 87 L.Ed. 1458." In that case the question was whether the plaintiff under a war risk insurance policy was totally and permanently disabled and the district court held that there was no sufficient evidence of his disability to go to the jury. This holding was affirmed by the Court of Appeals for the Ninth Circuit and by this court. Justice Rutledge in commenting on the plaintiff's claim that his rights under the 7th Amendment were violated said:

> "But objection has been advanced that, in some manner not wholly clear, the directed verdict practice offends the Seventh Amendment."
>
> * * *
>
> "If the intention is to claim generally that the Amendment deprives the federal courts of power to direct a verdict for insufficiency of evidence, the short answer is the contention has been foreclosed by repeated decisions made here consistently for nearly a century. More recently the practice has been approved

explicitly in the promulgation of the Federal Rules of Civil Procedure. Cf. Rule 50; Berry v. United States, 312 U.S. 450, 85 L.Ed. 945, 61 S.Ct. 637. The objection therefore comes too late."

In commenting on the divergent common law rules on procedural matters among the states the opinion goes on to say:

"This difficulty, no doubt, accounts for the amorphous character of the objection now advanced, which insists, not that any single one of the features criticized, but that the cumulative total or the alternative effect of all, was embodied in the Amendment. The more logical conclusion, we think, and the one which both history and the previous decisions here support, is that the Amendment was designed to preserve the basic institution of jury trial in only its most fundamental elements, not the great mass of procedural forms and details, varying even then so widely among common-law jurisdictions."

In *Diederich* v. *American News Co.*, (10th Cir.) 128 F.2d 144, affirming an order of the trial court directing a verdict for the defendant in a personal injury suit, contrary to a provision of the Oklahoma constitution, the court considered the right of trial by jury as guaranteed by the 7th Amendment, and said:

"This right guaranteed by the Federal Constitution is the right of trial by jury as at common law. It means a trial by a jury of twelve men in the presence and under the superintendence of the judge empowered to instruct them on the law and advise them on the facts, and (except on acquittal of a criminal charge) to set aside their verdict if in his opinion it is contrary to the law or the evidence."

* * *

"The power of the judge to pass upon questions of law is just as much an essential part of the process of

trial by jury at common law guaranteed by the Seventh Amendment, as is the power of the jury to pass upon questions of fact."

There are, of course, many cases where the sufficiency of the evidence to support a verdict for the plaintiff is the question that has to be determined by an appellate court. If there is such a sufficiency, the plaintiff is entitled to have the facts of the case determined by a jury. We want to emphasize that in the case at bar there was no fact question involved. If the conditional receipt means what we contend it means, the defendant was entitled to a directed verdict because the applicant was not insurable for the plan and rating applied for. There is no dispute in the facts on this point. If, on the other hand, the receipt created an immediate contract of insurance without any conditions or provisos whatsoever, the plaintiff was entitled to a directed verdict because there is no dispute in the evidence about the payment of the first premium and the execution of the receipt. The trial court did not treat the receipt as an unconditional binding receipt but submitted the case to the jury to determine one question only; whether the applicant was in good health on the date of the receipt as required by the first proviso. The applicant's insurability as required by the second proviso was ignored. No evidence whatever was offered by either party on the question of good health, unless it can be considered that the mere issuance of a medical certificate for a pilot's license two months previously was evidence of good health (R. 50). We submit that there were no questions of fact in the case requiring a jury verdict and that the determination of the case by the trial court should have been based upon a determination of the question of law involved in the construction of the conditional receipt. This question was decided by the Iowa Supreme Court in the *Reynolds*

case referred to many times in this brief. As there is no dispute in the testimony on any vital question of fact and as the case is a case which should be determined by the application of legal principles to an undisputed state of facts, then it cannot be said that the plaintiff has been deprived of a jury trial because the Court of Appeals held that under a proper construction of the receipt under Iowa law, no temporary insurance went into effect "for the reason that the applicant did not, and could not, meet the insurability condition set out in the conditional receipt because of his aviation pursuits."

It is the rule that questions not raised or passed on in an intermediate court will not be reviewed in a higher court. The constitutional questions presented by the petitioner relating to the 5th and 7th Amendments were not raised upon the original submission of this case in the Court of Appeals and consequently were not considered by that court. Opposing counsel states in his brief that the constitutional question was raised in the petition for rehearing and denied. The petition for rehearing is not in the Record before this Court but in view of counsel's statement we feel free to call the Court's attention to what was claimed there. The only claim in the petition was that the court violated the plaintiff's rights under the 5th and 7th Amendments by holding that Bliss' testimony as to his conversation with Hinkle about the decreasing term policy and about his answers in the application as to his aviation record were conclusively true. *As we have pointed out above, there is no such holding in the opinion.* We submit therefore that no constitutional questions were raised or passed upon by the Court of Appeals except the question just referred to which was raised for the first time in the petition for rehearing and which was based upon a misstatement of the Court's opinion. Under these circum-

stances these questions should not be reviewed by this Court, at all, but if the Court does pass on them, we respectfully submit for the reasons stated that the plaintiff's rights under the 5th and 7th Amendments have not been violated in any way.

Division VI.

Federal Jurisdiction.

When this case was removed to the United States District Court for the Southern District of Iowa, opposing counsel filed a motion to remand on the principal ground that the defendant, a Massachusetts corporation, licensed to do business in Iowa, was not a citizen of Massachusetts entitled to remove the case under the diversity of citizenship statute. This motion was overruled and the case proceeded to trial resulting in a verdict and judgment for the plaintiff.

When the case was appealed to the Court of Appeals for the Eighth Circuit the Record in that court was prepared in accordance with its rules. Rule 10a requires the Record to contain a statement of only so much of the entire Record on appeal as essential to show jurisdiction and to enable the court to decide the questions presented for review.

Mr. E. E. Koch, Clerk of that Court, on January 1, 1954, *issued with the approval of the court*, a pamphlet entitled "Suggestions to attorneys concerning appellate rules and practice". On page 2 of that pamphlet the following language is used:

> "Print only so much of the original record on appeal as is necessary to enable the Court to review the questions argued in your brief * * * Counsel for all

parties to the appeal are requested to cooperate in eliminating from the printed record all nonessential matter. *For example in a removed case, omit the removal papers unless removability is an issue.*" (Emphases above are ours).

Pursuant to this rule and suggestion the parties stipulated as shown by the stipulation on Page 1 of the Record:

"It is further agreed that the United States District Court for the Southern District of Iowa, Central Division, had jurisdiction of this cause, docketed in said Court as Civil Action 3-659, and that said case was properly removed by defendant from the District Court of the State of Iowa in and for Polk County to the United States District Court for the Southern District of Iowa, Central Division, and that the petition for removal was filed in said Court on November 8, 1955."

Consequently, the petition for removal, the motion to remand and the District Court's memorandum and order overruling the motion to remand were not made a part of the Record in the Court of Appeals and the only references thereto contained in said Record were those in the stipulation referred to above and in the Docket Entries in the District Court commencing on p. 75 of the Record referring to the petition for removal and memorandum and order overruling the motion to remand.

We submit that having in mind the suggestion of the Clerk for the omission of the removal papers unless removability is in issue, opposing counsel by the stipulation above referred to agreed that it was not an issue. But now in this Court as part of the Record, counsel has had printed commencing on p. 79, the memorandum and order overruling the plaintiff's motion to remand, certified to by the Clerk of the District Court. This is not a part of the Rec-

ord in the Court of Appeals, it is not certified to by the Clerk of that Court, and we submit that it is not properly a part of the Record here. We think it is clear, however, from the Record here as recited in the memorandum of the Court (R. 79) and in the plaintiff's petition in which she alleged that the defendant is a corporation organized under the laws of Massachusetts (R. 2), supported by the stipulation of the parties referred to above, that the necessary jurisdictional facts were stated to support the removal. The Record was satisfactory to the Court of Appeals which said (R. 82): "Jurisdiction based upon diversity of citizenship is established."

We concede that the parties cannot grant jurisdiction to the federal court by consent and that a federal court at any stage of the proceeding can inquire into its jurisdiction. We submit, however, that the stipulation is not a mere consent to jurisdiction; it is a stipulation to the effect that the facts necessary to show jurisdiction were properly presented to the court and that the case was properly removed.

Opposing counsel in his brief filed in this court makes no objection as to the Record. He raises the fundamental proposition that a foreign corporation admitted to do business in a state is not a citizen of the state of its incorporation and therefore is not entitled to removal. We do not think it is necessary to extend this brief by quotations from the long list of decisions commencing in 1844 on this point by this court as all members of the court are undoubtedly familiar with them. We merely mention *Louisville C. & C. R. Co.* v. *Letson*, 43 U.S. 2 How. 497, 11 L.Ed. 353, *Muller* v. *Dows*, 94 U.S. 444, 24 L.Ed. 207; *B. & O. R. R. Co.* v. *Koontz*, 104 U.S. 5, 26 L.Ed. 643; *New England Mutual Life Ins. Co.* v. *Woodworth*, 111 U.S. 138, 28 L.Ed. 379; *St. Louis & S. F. Ry. Co.* v. *James*, 161 U.S. 545, 40 L.Ed. 802; *Southern Ry. Co.* v. *Allison*, 190 U.S. 326,

47 L.Ed. 1079. The ruling of the District Court states that he is bound to adhere to the doctrine established in the Letson case, and as he found that the facts stated were sufficient to establish diversity of citizenship, the motion to remand was overruled.

Division VII.

The Writ of Certiorari Was Improvidently Granted.

We submit with the greatest respect for the Justices who voted to grant the writ of certiorari that it now appears from the briefs of counsel that the writ was improvidently granted for the following reasons:

1.

The case involves no principle "the settlement of which is of importance to the public as distinguished from that of the parties", to quote the often cited language of Chief Justice Taft in *Layne & Bowler Corp.* v. *Western Well Works*, 261 U.S. 387, 67 L.Ed. 712. It is not a case of "peculiar gravity and general importance" as referred to in *Hamilton-Brown Shoe Company* v. *Wolf Bros.*, 240 U.S. 251, 60 L.Ed. 629. It is not a case involving "a question of importance which is in the public interest to be decided by this court of last resort", as stated in *Magnum Import Company* v. *Coty*, 262 U.S. 159, 67 L.Ed 922.

This is simply a case involving a particular private contract, namely, the conditional receipt for a life insurance premium. We find from the cases which have come before the courts involving such receipts that hardly two of them are precisely alike throughout. It is the duty of the court to construe the specific language of the particular receipt under the law of the state in question, and to de-

termine whether the conditions on which it is based have been fulfilled. It is not the kind of a case where certiorari should be granted in view of the limitations on the writ by this court which we have cited above.

2.

The points argued by the petitioner were all presented to the Court of Appeals except those involving the alleged constitutional questions and the question of federal jurisdiction. These were not raised in the Court of Appeals at all and are therefore not referred to in the opinion. The questions of insurance law were argued there and the petitioner is now merely trying to get another hearing on these questions after being defeated in that court. "The jurisdiction to bring up cases for certiorari was not conferred upon this court to give the defeated party in the Circuit Court of Appeals another hearing." *Magnum Import Co.* case, 262 U.S. 159, *supra*.

3.

As a result of the decision in *Erie Railway* v. *Tompkins* this is not a case which presents a conflict between circuits. When questions of life insurance law were regarded as questions of general law it was not uncommon to grant certiorari in life insurance cases where there was such a conflict. At the time of the announcement of the Erie Railway decision, certiorari had already been granted or the petitions therefor distributed in three life insurance cases, *Ruhlin* v. *New York Life*, 304 U.S. 202, 82 L.Ed. 1290, *New York Life* v. *Jackson*, 304 U.S. 261, 82 L.Ed. 1329, and *Rosenthal* v. *New York Life*, 304 U.S. 263, 82 L.Ed. 1330. Following the Erie Railway case, these three cases were remanded for determination under governing state law. Mr. Justice Reed said in the Ruhlin case:

> "As to questions controlled by state law, however, conflict among circuits is not of itself a reason for granting a writ of certiorari. The conflict may be merely corollary to a permissible difference of opinion in the state courts * * *."

We cannot find a case since Erie Railway became effective in which certiorari has been granted involving a life insurance contract where a Court of Appeals has construed the contract by the application of governing state law to the contract involved.

Chief Justice Vinson in an address before the American Bar Association on September 7, 1949, reported in "Supreme Court Practice" by Stern and Grossman, 2d Edition, p. 107, said:

> "The Supreme Court is not, and never has been, primarily concerned with the correction of errors in lower court decisions. In almost all cases within the Court's appellate jurisdiction, the petitioner has already received one appellate review of his case. The debates in the Constitutional Convention make clear that the purpose of the establishment of one supreme national tribunal was, in the words of John Rutledge of South Carolina, 'to secure the national rights and uniformity of judgments.' The function of the Supreme Court is, therefore, to resolve conflicts of opinion on federal questions that have arisen among lower courts, to pass upon questions of wide import under the Constitution, laws, and treaties of the United States, and to exercise supervisory power over lower federal courts. If we took every case in which an interesting legal question is raised, or our *prima facie* impression is that the decision below is erroneous, we could not fulfill the Constitutional and statutory responsibilities placed upon the Court. To remain effective, the Supreme Court must continue to decide only those cases which present questions whose resolution will have immediate importance far beyond the particular facts and parties involved."

For the foregoing reasons we earnestly request the Court to reconsider its granting of the writ and to hold as it has done in many other cases that the writ was improvidently granted. While we have no way of knowing on what ground the writ was granted, we respectfully submit that the briefs of both parties now plainly show that no important question of general law is involved and that there is no conflict between circuits. The alleged federal questions are not in the Record and should not be considered by this Court, and even if in the Record are not of sufficient importance to be reviewed by this court on certiorari.

CONCLUSION.

The respondent respectfully prays that the case be disposed of by an order stating that it now appears from the arguments that the writ of certiorari was improvidently granted or by an affirmance of the decision of the Court of Appeals.

Respectfully submitted,

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